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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SPRENGER, OLSON & SHUTES, P.A.
and DAVIS, MINER, BARNHILL & GALLAND,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In the award of attorney's fees to successful plaintiffs in civil rights litigation, is there a right to a multiplier to enhance fees because of the risk borne by plaintiffs' attorneys where compensation was entirely dependent upon success?

2. Should the undertaking of risk by civil rights attorneys be compensated only where the risk arises from reliance on new legal theories of recovery or new remedies?

3. Does the District Court possess unreviewable discretion to deny an attorney's fees multiplier for risk borne by plaintiffs' attorneys in a civil rights case?

4. Is there a right to a multiplier of attorney's fees for obtaining outstanding results in a civil rights case?

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SPRENGER, OLSON & SHUTES, P.A.
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v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the decision of the Court of Appeals for the Seventh Circuit entered in this proceeding on October 2, 1986. Despite the risks faced by petitioners in litigating a vigorously defended racial discrimination case against Burlington Northern, Inc. for six years strictly on a contingency basis, the District Court and Court of Appeals denied any enhancement of the hourly fees awarded. Even though petitioners prevailed through a settlement reached in the early morning hours of the day trial was to begin, gaining thereby a $10 million monetary recovery and injunctive relief worth millions of dollars more for the victims of racial discrimination, the courts below held that there is no right to a multiplier of the hourly fees based on risk or on the outstanding results achieved.

OPINIONS BELOW

The opinion of the Court of Appeals, attached hereto as Appendix A, is reported at 810 F.2d 601 (7th Cir. 1986). The order of the Court of Appeals denying rehearing, attached hereto as Appendix B, is reported at 810 F.2d 611 (7th Cir. 1987). The decision of the District Court, attached hereto as Appendix C, is reported at 618 F.Supp. 1046 (N.D. Ill. 1985).

STATEMENT OF JURISDICTION

The Court of Appeals decision was made on October 2, 1986. Petitioners' petition for rehearing and suggestion for rehearing *en banc* was filed October 14, 1986. The petition was denied on February 23, 1987. Therefore, this petition for writ of certiorari is timely filed under 28 U.S.C. §2101(e).

STATUTES INVOLVED

42 U.S.C. §1988:

> * * * In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §2000-e(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs * * *.

STATEMENT OF THE CASE

In 1978, petitioners, two small law firms from Minneapolis and Chicago, filed lawsuits under 42 U.S.C. §1981 and Title VII on behalf of several black employees of Burlington Northern, Inc. ("BN"). These suits were ultimately consolidated into a class action alleging that throughout its railroad operations, BN had discriminated against blacks in hiring, firing, discipline, promotion, and transfer.

Over a six year period, petitioners invested over 17,000 hours of attorney and paralegal time in the case, which settled only a few hours before trial was to begin on November 7, 1983. Petitioners made this investment without any assurance that they would be awarded any fee or even be reimbursed for almost $1 million in expenses that lead counsel were forced to incur in order to prosecute the case to a successful conclusion.

Despite this risk, petitioners conducted extensive discovery and fully prepared the case for trial against vigorous opposition by two nationally prominent defense firms; no substantial settlement discussions occurred until trial was imminent. All of the witnesses in the fee petition hearing agreed that had the case gone to trial, plaintiffs had less than a fifty-fifty chance of prevailing, and even less possibility of obtaining the type and scope of relief embodied in the Consent Decree.

The settlement achieved is the largest Title VII race discrimination settlement ever reached. BN agreed to set up a non-reversionary back pay fund of $10 million, with plaintiffs receiving the benefit of interest earned on the fund until distributed, and to injunctive relief that, according to one expert witness, was worth an estimated $57.5 million to the class, depending upon BN's future business operations. The settlement also provided that BN would pay the reasonable fees and costs of plaintiffs' counsel.

Petitioners filed their request for fees and expenses in May 1984. Petitioners requested an aggregate hourly rate fee (or "lodestar") of $2,184,165.50 and an enhancement or multiplier under *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Following extensive discovery by BN, the District Court held an evidentiary hearing on the fee petition in November 1984. On September 20, 1985, it awarded the "lodestar" fees sought but refused to award a multiplier to compensate for risk or to reward the outstanding results obtained for the class. The District Court held that "the chance of not prevailing" and the unique "difficulties of trial" posed by this case did not constitute the type of "risk" that is relevant in determining the amount of fees to be awarded in civil rights cases. The District Court acknowledged that plaintiffs could lose this case, because of the serious claims asserted and the intense opposition by BN, but it held, as a matter of law, that the only type of "risk" that would justify enhancement was reliance on novel legal theories or remedies, a concept that the District Court equated with "exceptional success." 618 F. Supp. at 1062; App. C-31. The District Court further held that the extraordinary extent of relief obtained in the face of the conceded evidentiary and practical obstacles overcome by plaintiffs did not qualify as exceptional, because

counsel "did not create any new form of remedy" or establish any new rule of law. *Id.* at 1064; App. C-35.

The Court of Appeals, while recognizing that the law regarding enhancement to compensate for risk is unsettled and that this Court will likely rule on the propriety of risk multipliers in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, No. 85-5, affirmed the District Court decision on all major issues. The Court of Appeals stated that the District Court had not abused its discretion in awarding only the lodestar fees, but its opinion in effect held that a risk multiplier should never be used:

> Even in the absence of questions concerning the propriety of risk multipliers, we would consider dispositive the district court's finding that this case involved factual complexities and difficulties of trial preparation, but not the kind of significant risk engendered by having to rely on new legal theories of recovery or new remedies. 810 F.2d at 608; App. A-12.

The Seventh Circuit also affirmed the District Court's holding that lodestar fees can be enhanced for the results achieved only in rare, "landmark" cases that create new theories or remedies. *Id.* at 607; App. A-10-11.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH CONGRESSIONAL POLICY BEHIND THE CIVIL RIGHTS ATTORNEY'S FEES STATUTES AND WITH THE DECISIONS OF OTHER CIRCUITS.

The Seventh Circuit refused to uphold the use of a risk multiplier under 42 U.S.C. §§1988 and 2000e-(k). While holding open a slim possibility that a risk multiplier might be appropriate in the rarest of cases, its denial of enhancement of fees here demonstrates a conflict with the Congressional policy behind Section 1988 to encourage the filing of meritorious, but risky civil rights litigation.

The question whether a risk multiplier can ever be appropriate is before the Court in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, No. 85-5, argued October 15, 1986. Certiorari was granted in that case in part to resolve the conflict among the circuits on the propriety of a risk multiplier.

The circuit courts certainly are in complete disarray. Many courts have held or clearly stated that a multiplier should be given in a contingent case involving significant risk. *See Waters v. City of Atlanta*, 803 F.2d 1135, 1152 (11th Cir. 1986); *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986); *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 587 (3d Cir. 1984); *Craik v. Minnesota State University Board*, 738 F.2d 348, 350 (8th Cir. 1984); *Jones v. Diamond*, 636 F.2d 1364, 1382 (4th Cir. 1981). Other circuit courts have held that a multiplier should be given to compensate for risk only in the unusual or exceptional

case. *See Bebchick v. Washington Metropolitan Area Transit Commission*, 805 F.2d 396, 407 (D.C. Cir. 1986); *Lattimore v. Oman Construction*, 795 F.2d 930 (11th Cir. 1986); *Almond v. Boyles*, 792 F.2d 451, 457 (4th Cir. 1986); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 924 (6th Cir. 1984).

The court below and the court in *Ridenour v. Montgomery Ward & Co.*, 786 F.2d 867, 869 (8th Cir. 1986), appear to hold that there is never a right to receive a multiplier as compensation for having undertaken risk. Moreover, the lower courts in this case have now created a new conflict. Unlike other courts upholding or denying a risk multiplier based on the risk faced by plaintiffs of losing on the merits, the courts below redefined "risk" to mean reliance on novel legal theories or remedies.

If the use of a risk multiplier is approved in *Delaware Valley*, the judgment below in this case must, at the very least, be vacated for reconsideration in light of this Court's decision. However, this case presents the Court with a suitable and compelling opportunity for determining how a risk multiplier should be applied in civil rights litigation and the extent of discretion that a district court has in this area. Indeed, given the Seventh Circuit's lack of a clear holding, a mere vacating of its decision without specific guidance will likely be futile.

II.

THE RISKS OF NOT PREVAILING AT TRIAL ON FACTUAL ISSUES MUST BE FULLY COMPENSATED TO ENCOURAGE VICTIMS OF RACIAL DISCRIMINATION TO SEEK REMEDIES UNDER THE CIVIL RIGHTS LAWS.

The standards applied by the courts below foreclose multipliers in virtually all circumstances. Both courts, though some of their reasoning is unclear, clearly held

that such a multiplier may be appropriate only when the litigants successfully establish new legal theories or create new remedies. On the other hand, if, as in this case, a civil rights case involves difficult evidentiary issues and problems of proof that might lead to plaintiffs' defeat at trial, the courts held that no risk multiplier is proper.

This Court must immediately correct this significant error in construction of the civil rights laws. The courts below have turned the law on its head in this area. Incentives for bringing risky cases certainly should not be limited to lawyers who rely upon new theories or advance exotic remedies. The law should encourage filing racial discrimination claims that are well-founded on prior case law and statutes, but require difficult discovery and evidentiary proceedings to establish the fact of racial discrimination, particularly on a class-wide basis in employment cases.

The courts below disparaged the risks that result from evidentiary as well as other trial problems without extended discussion. The lower courts completely ignored the affidavit filed by then Professor, now Judge, Frank H. Easterbrook fully explaining why the risk in this type of case called for application of a multiplier. The Easterbrook affidavit pointed out, for example, that:

> Burlington Northern has attempted throughout to establish that any evidence of discrimination should be treated as isolated, that each plant or line of progression must be analyzed on its own. That defense multiplies the costs and the risks plaintiffs face. Important non-statistical evidence in this case was obtained only after this Court's order of December 10, 1982, required Burlington Northern to release its "self-critical analysis," which contained damning evidence of system-wide discrimination. When this litigation began in 1978, the plaintiffs did not know that Burlington Northern would assemble such evidence, and

> they certainly had no assurance of receiving it. (Burlington Northern litigated to keep the evidence from plaintiffs' hands, and it took a decision of the Eighth Circuit to override the claim of privilege.) App. D-11-12.[1]

This case is a prime example of the severity of the risk faced by plaintiffs' counsel in a case supposedly without "novel" elements. During the course of discovery the Seventh Circuit changed the governing law on the nature of evidence required to prove systematic employment discrimination. Plaintiffs had planned to use "snapshot" statistics to show at a given time the large discrepancy between BN's employment of blacks in particular areas and the racial composition of the labor force in those areas. This type of plaintiffs' case could have been prepared without the enormous time and expense ultimately incurred. But the Seventh Circuit held in *Movement for Opportunity & Equality, Inc. v. General Motors, Inc.*, 622 F.2d 1235 (7th Cir. 1981), that "snapshot" statistical proof was insufficient and that proof of the racial pattern of particular employment decisions over particular time periods would be demanded. During the same period, courts began insisting on sophisticated multiple regression analyses to take account of the simultaneous effects of the different variables that affect employment decisions. As a result, plaintiffs had to scrap their original plan and instead assemble, over a two-year period, a massive amount of employment data at a cost of nearly a million dollars, to make out their case.

In addition, BN used two major law firms over the course of the case and paid nearly $3 million in fees to the firm that took over responsibility for trial preparation in

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[1] The Easterbrook affidavit is reproduced in its entirety as Appendix D hereto.

August 1982, and charged BN for more than 22,000 hours of work in only 18 months. Plainly, BN's marching orders to its counsel were to spare no expense in conducting discovery and raising vigorous defenses to each of plaintiffs' claims. This strategy magnified both the risk and the cost of not prevailing faced by petitioners.

It is also indisputable that the economic reasons for a risk multiplier—to induce competent counsel to undertake civil rights litigation rather than cases that they could take under a normal fee arrangement—are the same whether the risk arises from difficult legal questions, substantial evidentiary issues, or a combination of both. As Professor Easterbrook concluded:

> (1) in order to induce competent counsel to take difficult litigation of this sort, it is necessary to offer the prospect of fees that will make them at least as well off as if they worked at their market rates for clients who paid when billed; (2) when payment will be delayed and there is a risk of non-payment or payment at a level insufficient to meet the market value standard, it is necessary to increase the payment (to award a multiplier) so that the anticipated remuneration equals the market rate; (3) this case was marked by both delay and substantial risk. We therefore conclude that a substantial multiplier is in order. App. D-1-2.

The decisions below obviously lost track of the real purpose of these civil rights laws, including Section 1988. These statutes were not enacted merely to reward attorneys for work voluntarily undertaken, but rather to see that the civil rights of minorities in particular are vindicated and that violations are fully remedied. By denying an award of attorney's fees that compensates for risk, the lower courts have guaranteed that similar meritorious cases, particularly involving substantial classes of black

employees, will not be filed in the future. It is completely illogical to suggest that victims of racial discrimination whose cases happen to involve novel legal theories or remedies should be encouraged to bring their lawsuits, whereas victims of pervasive but subtle racial discrimination who face evidentiary problems in establishing their claims, in part because of the scope and magnitude of the illegal discrimination, should be deterred from filing their actions. Yet that is what the reasoning of the courts below entails. Further, the decisions below perversely encourage the filing of pleadings artfully drafted to appear novel in either theory or remedy, and discourage straightforward use of established theories of liability and remedies in cases in which the risk arises mainly from evidentiary issues. It is also clear that the decisions below will encourage defense counsel to employ dilatory tactics to wear plaintiffs down and increase the cost of losing faced by plaintiffs' counsel.

III.

DISTRICT COURTS CANNOT BE GIVEN UNREVIEWABLE DISCRETION TO DENY ENHANCEMENT OF ATTORNEY'S FEES DESPITE THE GREAT RISK BORNE BY THE LITIGANTS AND THEIR COUNSEL.

The Seventh Circuit, in its order denying rehearing, cautioned that it was not holding that a risk multiplier could never be used to enhance awards of attorney's fees to successful civil rights litigants:

> [W]e did not address whether the lodestar amount should ever be adjusted upward to compensate for the risk of loss. Neither did we address whether, assuming this type of adjustment is legitimate, the use of a multiplier is an appropriate means to achieve this purpose. App. B-3.

Instead, it claimed that it was relying upon the District Court's exercise of discretion under all the circumstances of the case. App. B-2. Under the facts here, this "holding" is revealed as nothing more than empty rhetoric to dispose conveniently of a troublesome trial court decision.[2] The District Court exercised no discretion. It refused to apply a multiplier as a matter of law. Therefore, the Court of Appeals could not properly dodge the multiplier issue; indeed, that was the main issue before it.

The evidence was uncontradicted at the District Court hearing that plaintiffs' chances at trial were less than "fifty-fifty" of securing the relief sought because their evidence may have been found insufficient to establish systematic racial discrimination.[3] Moreover, there was a serious risk after the decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), that the class action determination may have been reversed by the District Court or on appeal, which effectively would have terminated the case. There was still the further risk that plaintiffs might

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[2] That the District Court's denial of a multiplier was based on a misunderstanding of the law is further demonstrated by the Court's later order allowing only 65% of the hourly fees incurred in litigating the first attorney's fees request. The District Court justified this substantial cut from the lodestar on the basis that it was "unreasonable" for petitioners to have even asked for a multiplier. Memorandum opinion dated May 15, 1986, App. E-8, n.10. However, at the time petitioners requested a multiplier there was abundant case law, even in the Seventh Circuit, upholding the practice, and the testimony that plaintiffs introduced regarding the risk of losing the case and for the enhancement to encourage talented lawyers to represent civil rights plaintiffs was uncontroverted.

[3] Indeed, the Assistant General Counsel of the EEOC evaluated plaintiffs' odds at the start of the case of achieving all the relief that class members received from the settlement at less than one in five.

fail to establish damages. Under these circumstances, the Seventh Circuit necessarily held that the District Court had *unreviewable* discretion to deny a risk multiplier despite the uncontroverted presence of substantial risk and the admission by the District Court that such risk of losing the case existed.[4] At least two circuit court decisions directly conflict with the court below on this issue by reversing as an abuse of discretion district court denials of a multiplier for risk. *In re Fine Paper*, 751 F.2d at 587; *Hall v. Board of Commissioners of Conecuh County*, 707 F.2d 464 (11th Cir. 1983).[5]

Plainly, the trial court must be given considerable scope to weigh the various factors that bear on the attorney's

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[4] The uncontradicted evidence at trial submitted to the District Court established that, without the availability of a multiplier to compensate for risk of loss, no competent attorney could be expected to undertake the tremendous financial burden of a case such as this one. The District Court made no findings on this point because it found it irrelevant. Its decision instead rests on the view that a multiplier for risk or exceptional success is unnecessary because dedicated counsel will be found who will be willing to make an economic sacrifice to help vindicate their clients' rights.

Congress, however, plainly disagreed when it enacted Section 1988. The purpose of that statute "was to ensure that the representation of important national concerns would not depend upon the charitable instincts of a few generous attorneys." *Northcross v. Bd. of Education*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

[5] The Court of Appeals also sidestepped the real issues by relying on the fact that petitioners were awarded fees based upon their 1984 rates, giving this fact three improper applications: as a reason for not awarding a success multiplier, 810 F.2d at 607, as a reason for not awarding a risk multiplier, 810 F.2d at 608, and as a reason not to give a multiplier to compensate for delay in payment, 810 F.2d at 609. This is particularly unfair in view of the fact that the only evidence in the case on the effect of paying at 1984 rates is that it did not adequately compensate even for the delay factor. *See* App. D-8-9.

fee decision, but simply ignoring the presence of risk, or rejecting its significance, is no exercise of discretion. If risk is to be a factor in enhancing attorney's fees awards, then the District Court decision here, rubber-stamped by the Court of Appeals, was completely arbitrary and unfounded.

IV.

PETITIONERS SHOULD BE REWARDED FOR THE OUTSTANDING RESULTS OBTAINED.

It is firmly established that attorney's fees awards should be enhanced under Section 1988 if outstanding results are obtained by plaintiff's counsel. *See Pennsylvania v. Delaware Valley Citizens' Council*, ___ U.S. ___, 106 S. Ct. 3088, 3099 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). The courts below grudgingly admitted that plaintiffs achieved a great success in the settlement finally reached on the eve of trial.[6] Yet the District Court warped

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[6] The evidence before the District Court demonstrated that the relief achieved by petitioners was truly exceptional. Julius LaVonne Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund, in an affidavit, which was admitted in the fee hearing and was uncontraverted, stated that:

> "This case resulted in extraordinary relief for the plaintiffs. If not the largest, it is one of the largest race discrimination cases ever settled. To my knowledge, there has never been a settlement in the railroad industry with comparable relief."

Bruce Elvin, Assistant General Counsel of the Equal Employment Opportunity Commission, further confirmed that:

> "Since the passage of the Civil Rights Act of 1964 . . . thousands of class actions of EEOC pattern or practice cases have been settled or litigated . . . and well over a thousand EEOC charges have been filed against railroads. And yet in not a single one of these instances has a class of race discrimination plaintiffs secured relief greater than that obtained here."

the "exceptional success" standard by construing it to mean only "historic" cases establishing new legal theories or remedies. Perversely, this would mean that each successful result obtained by civil rights attorneys would make it more difficult for subsequent victims of racial discrimination to find the wherewithal to obtain their remedies. Here plaintiffs and their attorneys fought for years against a major corporation willing to expend great sums to keep its history of racial discrimination hidden. Plainly, BN sought to wear down plaintiffs and their counsel and to make the case too expensive for them to pursue to trial. The plaintiffs and their attorneys took the full brunt of that challenge, assumed the full risk that no recovery for the class would be achieved, that 17,000 hours of time would never be compensated and that nearly $1 million in costs would not be reimbursed, and finally forced BN into a sweeping settlement that obtained millions of dollars in remedies for thousands of class members and opened up many new job opportunities in an industry that has been traditionally closed to racial minorities. It is inexplicable that the courts below, given this record, would deny even the possibility that these achievements merit special rewards so that other attorneys are encouraged to bring similar actions.

CONCLUSION

The courts below lost sight of the goals of the civil rights laws and the reasons why Congress enacted Section 1988. They approached this matter as cost-conscious accountants limiting attorney's fees to the minimal amount required for reimbursement based upon hours spent on

the case. But Section 1988 clearly intended to do more than that: to ensure that civil rights victims could retain strong and competent counsel to pursue difficult litigation and achieve significant remedies. The decisions below represent a resounding step backward in the enforcement of the civil rights laws.

Petitioners ask the Court to grant their petition and set this case for full argument and decision.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 85-2898, 85-3087

IN RE: BURLINGTON NORTHERN, INC.
EMPLOYMENT PRACTICES LITIGATION

APPEALS OF: PAUL C. SPRENGER, et al.,
Lead Counsel-Appellants,

WILLIAM E. MCBRIDE, et al.,
Plaintiffs-Appellants,

and

AMERICAN TRAIN DISPATCHERS
ASSOCIATION, AFL-CIO, et al.,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 78 C 269—**George N. Leighton,** *Judge.*

ARGUED MAY 16, 1986—DECIDED OCTOBER 2, 1986

Before CUDAHY and FLAUM, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

FLAUM, *Circuit Judge.* This appeal involves two issues left unresolved after the settlement of a multi-million-dollar Title VII race discrimination class action against the Burlington Northern railroad and its unions. The district court in Chicago certified the class, composed of black employees throughout the BN system, in 1978, and in 1979 the Judicial Panel on Multidistrict Litigation consolidated in Chicago all the Title VII race discrimination cases pending againt BN in several districts. The district court appointed as lead counsel for plaintiffs the Minneapolis firm of Sprenger, Olson & Shutes and the Chicago firm of Davis, Miner, Barnhill & Galland. After years of preparation and discovery, the case was settled a few hours before trial was to begin on November 7, 1983. The settlement, as embodied in a consent decree, provided injunctive relief and created a fund of $10 million for back pay compensation, as well as providing that plaintiffs' counsel would be paid reasonable fees. This fees provision is the basis for the two issues presented in this action: (1) what is a reasonable fee and (2) who among the defendants shares responsibility for paying the fees. The lead law firms appeal the district court's refusal to award them anything above the "lodestar" figure, obtained by multiplying their reasonable hours by reasonable hourly rates, plus post-judgment interest. The unions appeal the district court's order requiring them to contribute to BN's payment of the lead counsel's fees. We affirm both of the district court's rulings, although we reverse a minor part of the district court's order concerning the apportionment of the fees awarded.

I. FACTS.

A. *The Consent Decree.* The class action against BN involved claims of discrimination in hiring, discipline, discharge, assignment, and promotion, and the defendants mounted a vigorous defense to the case. Many of the plaintiffs' discovery requests were opposed, *see In Re Burlington Northern, Inc.*, 679 F.2d 762 (8th Cir. 1982), and plaintiffs' lead counsel alone (there were additional

counsel pursuing "tagalong" cases and representing the intervening EEOC) expended some 12,228 hours and 5,158 hours of paralegal time in prosecuting the action. The relief provided by the consent decree was extensive. In addition to the $10 million fund, which was to be paid out to claimants who could establish that they had been subjected to racial discrimination in hiring, promotion, or discharge, the decree bound Burlington Northern to a wide range of injunctive measures, including hiring and promotional requirements, references for discharged employees, seniority protection for promoted employees, and training programs.

The last provision of the consent decree provided the following:

> Counsel for private plaintiffs and EEOC shall be paid their costs including experts' fees, and including (except as to EEOC) reasonable attorneys' fees, on all issues involved in this litigation, determined as follows. The parties shall meet and attempt to agree upon the amount of such fees and costs within fourteen days of the entry of the decree. Counsel for plaintiffs and EEOC will to the extent feasible identify the portion of their costs and fees chargeable to the scheduled transfer and promotion or craft seniority issue. In the event the parties are unable to agree in whole or in part within an additional 30 days, any unresolved issues, including any issue as to the apportionment of those costs and fees among all defendants, shall be presented to the court for resolution upon petition of counsel for plaintiffs and EEOC. BN and the unions may litigate the amount of the costs and fees sought.
>
> BN will not dispute the entitlement of counsel for private plaintiffs and EEOC to reasonable costs, including (except as to EEOC) reasonable attorney's fees, as provided above, on any issue but may seek apportionment of those costs and fees among all defendants or contribution from the unions for an allocable portion of those costs and fees.

> The defendant unions do not agree that private plaintiffs and EEOC are entitled to any costs and fees from them. The defendant unions may make whatever objections they deem appropriate to the private plaintiffs' and EEOC's petition as well as to any effort by BN to secure apportionment or contribution for an allocable portion of those costs and fees.

The decree was signed by counsel for plaintiffs, BN, the EEOC, and the unions on November 21, 1983 and was formally approved by the court on April 2, 1984.

B. *The Attorneys Fees Action.* The EEOC and "tag-along" counsel came to an agreement with BN and the unions whereby they would receive nearly $1 million in fees and costs. The two lead counsel were unable to settle with the defendants on the issue of fees, however, and filed petitions for fees and costs with the district court. The petitions documented some $1.1 million in advanced expenses, and the district court ordered BN to pay this sum "subject to its right to seek contribution from the union defendants." As to fees, the lead counsel presented a "lodestar" figure of $2,184,165.50, which represented 12,228.2 attorney hours and 5,157.8 paralegal hours multiplied by various hourly rates. Lead counsel sought interest on this figure from the date of the consent decree's approval. Counsel further requested that the lodestar figure be subjected to a multiplier of 2.5 for the attorney fees, bringing the total fees requested to $4,981,145.00, plus interest. BN conceded that the hours expended were reasonable, but objected to the hourly rates requested by the lead counsel and to the use of a multiplier. BN further claimed that lead counsel were not entitled to interest on the fees from April 2, 1984, the date of the consent decree's final approval. Finally, BN requested that the district court order the defendant unions to assume responsibility for some portion of the fees and costs.

The district court received briefing and affidavit testimony regarding these remaining disputes, and it issued an opinion on September 20, 1985. The district court found

that the requested hourly rates were reasonable, given that "the object of a fee determination is to simulate the results which would be obtained if the lawyer involved were dealing with a paying client." The district court noted that as to each lawyer involved, "there is evidence that the hourly rates requested have either been paid by clients or awarded to them by a court in the past," and that "[t]he requested rates approximate, as close as these matters can, the prevailing ones paid to comparable attorneys in the relevant community." The total lodestar fee of $2,184,165.50 thus was awarded, along with interest from the date of the "order entered in accordance with this memorandum." The district court concluded that interest should not be calculated from the date of the decree's approval, since prejudgment interest was not merited and would be "grossly unfair" to BN.

The district court further declined to apply a multiplier to the lodestar figure. The lead counsel had argued that the exceptional success they achieved, and the extreme risk they undertook in representing the plaintiff class, merited upward adjustment of the fee award, and that multipliers are necessary in order to attract sufficient numbers of counsel to represent Title VII plaintiffs. The district court undertook a review of the applicable Supreme Court precedent involving fee-shifting provisions in civil rights laws, as well as case law from the circuits, and noted that one factor in the determination of whether to apply a multiplier is "exceptional success." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified."). The district court went on to acknowledge that the later case of *Blum v. Stenson*, 465 U.S. 886, 898 (1984), clearly burdened the fee applicant with proving that an upward adjustment was necessary in order to obtain a reasonable fee. The district court went on to review the evidence submitted by the parties and found

that the lead counsel had failed to establish that the success they had achieved was so "rare or uncommon" as to warrant a multiplier.

In addition to identifying exceptional success as a factor in its determination, the district court evaluated the lead counsel's argument that the *ex ante* risk they took in undergoing the representation was so great that the lodestar had to be adjusted upward in order to compensate them fully *ex post*. The district court concluded that although the risks of Title VII litigation may be relevant to the fee determination, the lead counsel had not met their burden of demonstrating that anything beyond the general risks of litigation were present at the outset of this class action. The district judge found that counsel's evidence concerned merely the difficulties associated with preparing any big case for trial, as opposed to the kind of risk warranting greater-than-lodestar compensation. Distinguishing the case of *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), in which a multiplier had been awarded, the district court pointed out that the *Thompson* plaintiffs had relied on a new theory of discrimination and a new form of remedy for their success, and had created a new rule of law in the process. Since the district court found that the BN litigation involved none of these features, it held that the kind of risk warranting the use of a multiplier was not present. The court also found incredible the lead counsel's evidence claiming that the risks of Title VII litigation in general were such that multipliers were necessary in order to attract competent counsel. As a final factor in its decision to deny a multiplier, the district court commented that in its award of a full lodestar, it had granted top current hourly rates for all of the hours that counsel had expended during the six years of litigation, even though during many of those years they could not have commanded those rates. As a result, the district court was convinced that it had awarded a fully compensable fee.

On the final issue of the unions' contribution to the lead counsel's fees and costs, the district court found that: (1) the consent decree contemplated that BN would seek con-

tribution from the unions, which preserved their rights to object; (2) Title VII case law does not prohibit contribution from defendant unions and in fact provides numerous examples of such an allocation of attorneys fees and costs; and (3) the plaintiffs obtained enough success in seniority-related issues against the unions to be considered "prevailing parties" as to them. Accordingly, the district court ordered that fifty percent of fees and costs clearly attributable to seniority-related issues be borne by the unions, as well as ten percent of the remaining fees and costs.

In its conclusion, the district court summarized its order and added one provision: the lodestar fees were to be distributed to the attorneys and paralegals in the amounts listed in the fee petitions. This appeal by the lead counsel and the unions followed.

II. TIMELINESS OF THE APPEALS.

Before we reach the merits of the appeals, we must address BN's assertion that the appeals should be dismissed because both the lead counsel and the unions failed to file their notices of appeal within the thirty-day period mandated by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. It is true that lead counsel filed their notice of appeal on October 28, 1985, thirty-eight days after the district court's September 20 decision, and that the unions filed their notice on November 27, 1985, thirty-three days (*see* Rule 4(a)(4)) after the district court on October 25 denied their motion to alter or amend the September decision. Nevertheless, we find that both appeals are timely.

Rule 4(a)(1) has a special sixty-day rule for cases in which the United States is a party: "if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days." Since the EEOC was a party in the class action against BN, a signatory to the consent decree, and remains a party to the decree-monitoring proceedings in the district court, it clearly has a sufficient interest in the action to be a

"party" for purposes of Rule 4(a)(1). *See, e.g., United States v. American Society of Composers, Authors & Publishers (ASCAP)*, 331 F.2d 117, 119-20 (2d Cir.) (distinguishing situation in which consent decree gives United States a continuing role in action from situation in which United States has "long since become a merely nominal party"), *cert. denied*, 377 U.S. 997 (1964). Moreover, the fact that the United States was not *directly* concerned with the particular decision appealed (the EEOC definitely has a *policy* interest in attorney fee awards in Title VII actions) is irrelevant. *See, e.g., ASCAP*, 331 F.2d at 119 ("[t]he stated criterion is whether the United States is a party to the action, . . . and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined when the order is made"); *see also, e.g., Rochester Methodist Hospital v. Travelers Insurance Co.*, 728 F.2d 1006, 1011-12 (8th Cir. 1984); *In re Paris Air Crash of March 3, 1974*, 578 F.2d 264, 265 (9th Cir. 1978). Thus, the sixty-day period of Rule 4(a)(1) is applicable, and the appeals are timely.

III. LEAD COUNSEL'S FEES.

The lead counsel appeal four aspects of the district court's decision. First, they argue that the exceptional success they achieved in the litigation merits a multiplier, and that the district judge erred by comparing their success only to other cases of exceptional success. Second, they assert that the district court erred when it refused to award them a multiplier to compensate them for the risk of not prevailing, and they believe this error is grounded in the court's alleged decision that risk analysis is irrelevant to multiplier determinations and on an erroneous finding that lead counsel had not proved by specific evidence that they were entitled to a risk multiplier. Third, lead counsel claim that the district court's order erroneously left them uncompensated for the delay in payment. Finally, they urge us to reverse the district court's order requiring that the fees be paid to the attorneys and

paralegals in the amounts listed in the fee petitions. For the reasons we discuss below, we affirm the district court on the first three of these issues and reverse that portion of the district court's order directing payment of the award to the firms' attorneys and paralegals.

A. *The "exceptional success" multiplier.* Since oral argument in this case, the Supreme Court has issued a minor opinion relating to the proper use of multipliers in fee-shifting situations, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 106 S.Ct. 3088 (1986). *Delaware Valley* involved attorneys fees under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, which, like Title VII, contains a fee-shifting provision authorizing awards of reasonable attorneys fees. In the underlying litigation, the Delaware Valley Citizens' Council filed suit to compel Pennsylvania to implement a vehicle emission inspection and maintenance program. The parties eventually entered into a consent decree and Delaware Valley sought attorneys fees and costs. The district court calculated the lodestar figure by multiplying reasonable hours by reasonable hourly rates. It then applied a multiplier based on the risk of not prevailing and on "superior" work that " 'culminated in an outstanding result.' " 106 S.Ct. at 3088, quoting the district court's opinion, 581 F.Supp. 1412, 1431 (E.D. Pa. 1984). The Court of Appeals for the Third Circuit affirmed, saying with respect to the exceptional success factor that "this was 'the rare case where the fee applicant offer[ed] specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional.' " 762 F.2d 272, 280 (3d Cir. 1985), quoting *Blum v. Stenson,* 465 U.S. 886, 899 (1984).

The Supreme Court reversed the exceptional success multiplier, but set the risk multiplier issue for reargument, as we discuss in the next section. The Court's position on the use of multipliers to reward exceptional success leaves little doubt that this factor is disfavored. The Court reiterated the position it took in *Blum* that "the

proper first step in determining a reasonable attorney's fee is to multiply 'the number of hours reasonably expended on the litigation times a reasonable hourly rate.' " 106 S.Ct. at 3098, quoting *Blum*, 465 U.S. at 888. The Court reemphasized that the resultant figure is "more than a mere rough guess or initial approximation of the final award to be made. Instead, . . . '[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled." *Id.* at 3098, quoting *Blum*, 465 U.S. at 897.

The Court enunciated two rationales for this presumption. The first is that fee-shifting provisions ordinarily are not meant to provide a windfall to attorneys or to "replicate exactly the fee an attorney could earn through a private fee arrangement with his client." *Id.* at 3098. Rather, the aim of fee-shifting statutes is to enable private parties to obtain legal counsel. The Court concluded that since Delaware Valley "was able to obtain counsel without any promise of regard for extraordinary performance," the purpose of the Clean Air Act's statutory fee provision was satisfied. *Id.* at 3099.

The second rationale for presuming that the lodestar constitutes a reasonable fee is that "when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance." *Id.*

In the face of this strong presumption that the lodestar figure encompasses the factor of performance, we will not reverse as an abuse of discretion the district court's re-

fusal to award a multiplier based on exceptional success. *See Evans v. Jeff D.*, 106 S.Ct. 1531, 1542 & n.26 (1986). The district court found that the success in this case did not replicate that of other, pre-*Delaware Valley*, cases in which multipliers had been awarded, and although we have nothing but admiration for the lead counsel's performance, we cannot disturb that finding. Moreover, the hourly rates granted lead counsel were, in the words of the district court, "the top they can request," and all of counsel's requested hours were awarded. Thus, lead counsel were given the top current billing rates for every hour they expended on the litigation—clearly, in light of *Delaware Valley*, a fee that fully compensates them for their fine work and successful results. Finally, one can question whether enhancement for exceptional success is *ever* appropriate. "[T]he lodestar figure includes most, *if not all*, of the relevant factors comprising a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Delaware Valley* at 3098-99 (emphasis added). We accordingly affirm the district court's refusal to award a multiplier for exceptional success.

B. *The risk multiplier.* In *Delaware Valley*, the Supreme Court expressly left undecided the question of upward adjustment of the lodestar in order to compensate for the risk of loss, a question it has also declined to decide in *Blum*. The Court noted that the circuits were not in complete agreement on the issue, and it set the case for reargument. Until it issues an opinion on that question, therefore, we are left with some uncertainty regarding the wisdom of risk multipliers. Existing Supreme Court precedent, however, emphasizes that the lodestar figure is the *presumptively* reasonable attorneys fee and thus does not encourage us to find that the district court abused its discretion in denying a multiplier. *See Delaware Valley*, 106 S.Ct. at 3098; *City of Riverside v. Rivera*, 106 S.Ct. 2686, 2696 (1986) ("In order to ensure that lawyers would be willing to represent persons

with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case."); *Blum*, 465 U.S. at 901.

Nevertheless, we have noted that "[o]nly by offering to pay the lawyer his opportunity wage, the compensation he could obtain by representing paying clients, may a court induce the lawyer to take civil rights cases." *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986). This opportunity wage may be difficult to derive using hourly rates as the basis, because hourly rates usually are those "fees that lawyers charge to clients who pay promptly when billed." *Id.* Payment pursuant to fee-shifting statutes, however, is contingent on success in the litigation and is delayed until after the underlying litigation is over, two characteristics that normally are not factored into hourly rates. One way to attempt to compensate attorneys fully, therefore, is to multiply the lodestar. We noted in *Kirchoff*, however, that such an adjustment is artificial and problematic: "[o]ne common concern with compensation for risk is that the multiplier should rise as the probability of success falls, soaking the unlucky defendant who had a good case . . . but lost anyway and therefore faced a huge multiplier." *Id.* Conversely, risk multipliers may reward lawyers for bringing unmeritorious litigation. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1985). For these reasons, this circuit has not favored the use of risk multipliers. *See, e.g., id.*; *Bonner v. Coughlin*, 657 F.2d 931, 936 (7th Cir. 1981) (per curiam).

With this case law in mind, we will not find that the district court abused its discretion in awarding only the lodestar. Even in the absence of questions concerning the propriety of risk multipliers, we would consider dispositive the district court's finding that this case involved factual complexities and difficulties of trial preparation, but not the kind of significant risk engendered by having to rely on new legal theories of recovery or new remedies. *See Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 604 (7th Cir. 1979). Moreover, lead counsel in fact received

some compensation over and above that which they would have received from a regular paying client, since they were compensated for *all* their hours at current rates that they would not have been able consistently to charge over the six-year span of the litigation, a factor that also mitigates the delay in payment, as we discuss below. For these reasons we affirm the district court's refusal to apply a risk multiplier to the fee award.

C. *Interest as compensation for delay in payment.* Lead counsel sought interest on the fee award from the April 1984 approval of the consent decree in order to compensate them for the delay in payment. Counsel argue that since they submitted fee petitions in June of 1984 and based their figures on then-current hourly rates, they were uncompensated for the delay between that date and September 1985, when the district court entered its decision and order. While we are concerned with the delays that counsel in these kinds of cases face when litigating fee awards, we are bound by the statutory presumption that interest on money judgments "shall be calculated from the date of the entry of the judgment." 28 U.S.C. § 1961(a). While this statute does not preclude prejudgment interest, the award of such interest is committed to the discretion of the district court and is to be based on equitable considerations. *See, e.g., Michaels v. Michaels,* 767 F.2d 1185, 1204 (7th Cir. 1985).

Here, the delay in judgment was occasioned by a legitimate dispute over several issues, notably the question of fee multipliers. BN vigorously asserted that lead counsel were not entitled to the award of a multiplier, and in light of our holding, their position was not a vexacious or unreasonable one. The district court found that it would be "grossly unfair" to penalize BN for asserting a defense to the lead counsel's request, and we cannot characterize this decision as an abuse of discretion.

Moreover, lead counsel may have been compensated, at least in part, by the fact that they were paid at the top 1984 hourly rates for all of the work they performed

throughout the litigation. We have noted that "if the fee award was based upon prevailing hourly rates, as opposed to those in effect at the time services were rendered, any harm resulting from the delay would be greatly diminished or altogether eliminated." *Bonner*, 657 F.2d at 937. In the absence of evidence, we have no basis on which to conclude that payment based on 1984 rates compensated lead counsel only for the delay in payment up to that time; in fact, it may also have ameliorated the delay from June 1984 to September 1985. We therefore will not reverse the district court's refusal to order interest from the date of the consent decree's approval.

D. *Apportionment of fee award.* In the last part of its decision, the district court ordered that the individual attorneys and paralegals in the lead counsel's firm be paid the amounts shown in the fee petitions. According to the judge's order, for example, an associate whose lodestar figure came to $140,000 would receive that sum from the fee award. This amount represents a billing rate of $110 per hour, a rate that we can assume with some confidence is not equivalent to what the attorney earns on an hourly basis. Law firms, like other businesses that sell time, must set their hourly rates at an amount greater than that needed to pay their attorneys' or paralegals' salaries; they must figure into those rates all their costs of doing business. A reasonable hourly rate for purposes of a fee award, therefore, is not the same as reasonable compensation for an individual attorney, and we therefore reverse this portion of the district court's order and direct that the award be paid to the respective law firms, not the individual attorneys and paralegals.

IV. THE UNIONS' CONTRIBUTION.

The district court ordered that the thirteen union defendants should assume responsibility for some portion of the fees and costs awarded to lead counsel, and it granted BN contribution from the unions in the following manner: fifty percent of the fees and expenses clearly attributable

to seniority-related issues was allocated to the unions, as well as ten percent of fees and expenses not clearly attributable to seniority-related issues. The unions thereafter filed a motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the district court modify its order to the extent that the unions not be required to contribute ten percent of the fees and expenses attributable to issues concerning hiring, discipline, and discharge, since the consent decree provided that BN was to bear full responsibility for fees and expenses relating to these issues. The district court denied this motion and the unions now appeal, asserting as grounds for reversal: (1) their alleged immunity from liability for any portion of the lead counsel's fees and expenses; and (2) the district court's alleged error in denying their Rule 59(e) motion. We are unconvinced that either of these grounds merits reversal, and we therefore affirm the district court's decision.

A. *Immunity from liability.* The unions argue that under the rule of *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77 (1981), BN has no right of contribution from the unions. We cannot agree that *Northwest Airlines* extends that far. The Court there held that an employer has no federal statutory or common law right of contribution from a non-defendant union, 451 U.S. at 94, 98, but the Court clearly did not preclude recovery from a union that was a named defendant in a Title VII action. Such a reading of *Northwest Airlines* ignores the Court's explicit statement that "[a] court's broad power under [Title VII] . . . to fashion relief against all respondents named in a properly filed charge [was] not at issue in this litigation since no charge was filed against either of the respondent unions." *Id.* at 93 n.28. The unions have not presented a persuasive argument for limiting the district court's power to award attorneys fees to the prevailing party in this case and to require all of the named defendants to share the responsibility for those fees. Accordingly, we find that nothing in the statute or case law prohibits the order of contribution.

The unions also claim immunity from liability for a portion of the fees because lead counsel addressed their fee petitions to BN, and not to the unions. We agree with the district court that the consent decree clearly provided for the procedural events that transpired here. The decree states that "BN . . . may seek apportionment of those costs and fees among all defendants or contribution from the unions." The decree further provided that the unions preserved their right to object to the fee petitions "as well as to any effort by BN to secure apportionment of contribution." This language contemplates, as the district court found, that "fees and expenses would be sought from Burlington; that the railroad would then seek apportionment among and contribution from the unions; and that the unions preserved the right to object to any apportionment or contribution." We therefore cannot find the unions immune from liability for a portion of the prevailing party's attorneys fees.

B. *The Rule 59(e) motion.* The unions moved the district court, pursuant to Rule 59(e), to alter or amend its order requiring the unions to pay, in addition to fifty percent of the seniority-related fees and expenses, ten percent of fees and expenses unattributable to seniority issues. The unions based their argument on the consent decree, which states in an addendum that "BN will not seek apportionment of or contribution towards the costs and fees relating to the issues [of hiring, discipline, or discharge] from the unions." The district court denied this motion, in part because of its finding that the unions had waived this argument by not bringing it before the court in the underlying contribution proceeding. The unions' failure to make its argument to the district court at the appropriate time was a fatal error. BN's request for contribution from the unions contained a detailed calculation by attorney and firm of how much the unions would have to pay under the proposed ten percent formula. The unions failed to counter with their own calculation of a proper allocation; instead, they waited until they filed the Rule 59(e) motion to present figures to the district court. Al-

though the district court obviously was aware of the language of the consent decree addendum, the unions could not expect to wait until *after* the court issued its judgment to make an argument based on that language. We agree, therefore, that the unions waived whatever argument they may have had regarding the ten percent allocation. Accordingly, we affirm the district court's order requiring contribution.

V.

For the reasons stated above, the district court's order of September 20, 1985 is AFFIRMED, with the exception of that portion directing payment of the fees award to the attorneys and paralegals in the amounts listed in the fee petitions. That portion of the district court's order is REVERSED in accordance with our opinion above.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 14, 1986
February 23, 1987.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

IN RE: BURLINGTON NORTHERN, INC.
EMPLOYMENT PRACTICES LITIGATION

No. 85-2898 v.

APPEALS OF: SPRENGER, OLSON & SHUTES, P.A. and DAVIS, MINER, BARNHILL & GALLAND,

Lead Counsel-Appellants,

and

WILLIAM E. MCBRIDE, et al.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 78 C 269—**George N. Leighton,** *Judge.*

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

ORDER

In denying this petition for rehearing, we wish to emphasize that our holding was a narrow one. We held only that, in light of recent Supreme Court precedent, the district court's failure to apply a multiplier to the appellants' fee award in order to compensate them for the risk of losing the case was not an abuse of discretion.

The Supreme Court appeared to be open to the concept of risk compensation in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Court stressed that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, . . ." 424 U.S. at 434. Justices Brennan, Marshall, Blackmun, and Stevens, concurring in part, were more explicit, stating that a district court awarding fees should "consider both delays in payment and the prelitigation likelihood that the claims which did in fact prevail would prevail." *Id.* at 449.

However, the Court retreated from this position in *Blum v. Stenson*, 465 U.S. 886 (1984). In *Blum*, the Court held that the lodestar amount, rather than being a mere "rough guess" or initial approximation of the final award, should be *presumed* to be the reasonable fee. *Id.* at 897. The Court stated that a district court should make upward adjustments to the lodestar amount only in "the rare case where the fee application offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " *Id.* at 899. *Blum* expressly left open the question of whether the risk of not being the prevailing party could ever justify an upward fee adjustment. 465 U.S. at 901, n.17. As we noted in the opinion, the Supreme Court has called for re-argument in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 3100 (1986), on this question.

In this case, the district court did not find that the plaintiffs' success was exceptional within the meaning of *Blum*, and in the absence of evidence to demonstrate that this finding was an abuse of discretion, we were constrained to follow *Blum* and affirm the district court's judgment. In so deciding, we did not address whether the lodestar amount should ever be adjusted upward to compensate for the risk of loss. Neither did we address whether, assuming this type of adjustment is legitimate, the use of a multiplier is an appropriate means to achieve this purpose. These questions remain open in our circuit. *See Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986). We look to the decision in *Delaware Valley* to shed more light on this area.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by attorneys for plaintiffs-appellants, no judge in active service has requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly, it is ordered that the aforesaid petition for rehearing be, and the same is hereby, denied.

** The Honorable Frank H. Easterbrook, Circuit Judge, did not participate in the consideration of this petition for rehearing.

APPENDIX C

[September 20, 1985]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 374 — No. 78 C 269

The Equal Employment Opportunity Commission, Gregory Jones, Owen T. Sloan and Robert Jeffrey, Jr.,

Plaintiff-Intervenors,

and

William E. McBride, William H. Butler, Lenno Edwards, Albert White, Brunice McNeal, Ruben McGaughy, William Forbush, Tyrone Coffee, Hilary R. Jones, Dubois Gilliam, and Michael Love, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Burlington Northern Inc.; Brotherhood of Locomotive Engineers; United Transportation Union, AFL-CIO; Railroad Yardmasters of America, AFL-CIO; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO; Brotherhood of Maintenance of Way Employees, AFL-CIO; American Train Dispatchers Association, AFL-CIO; International Association of Machinists & Aerospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths,

(Caption continued on following page)

Forgers & Helpers, AFL-CIO; Sheet Metal Workers' International Association, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Brotherhood of Railway Carmen of U.S. and Canada, AFL-CIO; International Brotherhood of Firemen & Oilers, AFL-CIO; Brotherhood of Railroad Signalmen, AFL-CIO,

Defendants.

Before the Honorable George N. Leighton
U.S. District Judge

Memorandum

I

This multi-district litigation involves suits, some of them class actions, and intervenor complaints which allege that a railroad corporation and its unions have discriminated against Negroes in employment opportunities. On the day of trial, in a spirit of compromise, cooperation, and amicability, lead counsel for plaintiffs and the class, and the chief lawyer for the railroad, settled all the claims of the plaintiffs and members of the class, a group whose size has been estimated as between 5,000 and 20,000 Negroes. Then, the lawyers agreed on a consent decree which granted plaintiffs, members of the class, and charging parties, monetary recovery and general as well as special relief.

In addition, the railroad agreed to pay the attorney fees of counsel for the private plaintiffs. Later, this court approved the consent decree; and in accordance with its terms, the railroad has paid the fees and expenses of all the lawyers in the case except lead counsel for plaintiffs and the class. Further, without consent, it has paid EEOC the costs which the agency has disbursed in the course of this litigation.

Now, lead counsel have filed petitions asking this court to determine the attorney fees, plus a multiplier, which

the railroad should pay them, and the amount of the advanced costs for which they should be reimbursed.[1] The petitions have been briefed; and in the course of its written submissions, the railroad concedes that petitioning counsel are entitled to reasonable fees; that the number of hours claimed were worked by counsel and their legal assistants; and that the expenses for which reimbursement is sought were advanced and would be paid by the railroad.

However, the railroad contends that lead counsel seek hourly rates which are at least ten percent to twenty percent too high; and that the lower rates it proposes are equal to those charged by experienced lawyers who defend employment discrimination suits in the communities where petitioning counsel practice. The railroad argues that the fees, plus a multiplier, which petitioning counsel seek, are unreasonable; it insists that the record of this case does not support any enhancement of the lodestar figure to which lead counsel undoubtedly are entitled. Therefore, the parties ask this court to resolve four issues: first, whether the rates per hour at which lead counsel seek attorneys' fees are reasonable; second, whether the fees awarded to lead counsel should bear interest from April 2, 1984, the date this court fully approved the consent decree; third, whether this case was the kind of "exceptional success" that would justify lead counsel being given a multiplier as a bonus for the legal work they have

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[1] Burlington does not question the standing of lead counsel to file these petitions. In view of this, the court does not either, although it is aware of at least one recent case holding that lawyers "have no standing whatsoever to file an application for a direct award of attorneys' fees under section 2000e-5(k) [of Title VII]." *Rainsbarger v. Columbia Glass & Window Co.*, 600 F. Supp. 299, 301 (W.D. Mo. 1984). This court, as did the court in *Rainsbarger*, will construe the petitions as having been filed by the named plaintiffs, it being conceded they are the prevailing parties as required by Section 706(k) of Title VII. Further, the court will assume that these petitions were filed in accordance with the wishes of named plaintiffs, and at their direction, or with their permission.

performed; and fourth, whether the defendant unions should be ordered to assume the responsibility for some portion of the fees and expenses which are ordered paid to counsel for plaintiffs and the class.

II

On August 22, 1974, an EEOC commissioner, acting pursuant to Sections 706 and 707 of the Civil Rights Act of 1964, as amended, filed a charge which alleged that Burlington Northern, Inc., a multi-state railroad corporation,[2] and thirteen international unions representing BN employees, had been "unlawfully discriminating against Blacks, Spanish-surnamed Americans, Orientals, American Indians and women because of their race, color, national origin and sex with respect to recruitment, hiring, job assignment, job classification, discharge, wages, promotional opportunity, training and other terms, conditions and benefits of employment." EEOC propounded interrogatories which were answered by the railroad, demanded documents which were produced, and interviewed or deposed BN officials. This process, which was mainly investigatory, continued for a number of years.

In July 1977, the first of some thirteen or fourteen civil actions was filed against Burlington in the United States District Court for the District of Minnesota. It was a suit by Claude Brown against BN and one of its unions alleging race discrimination in employment opportunities. Thereafter, different suits were filed by other plaintiffs in federal courts in Washington, Nebraska, Missouri, and in this district. All of the complaints alleged racial discrimination in employment, some asserting claims under 42 U.S.C. § 1981, but all invoked Title VII of the Civil Rights Act of 1964. Some of the plaintiffs sought relief only for themselves, others were class suits against BN

[2] Hereafter, Burlington Northern, Inc., will be referred to as "Burlington", "the railroad", or by the acronym "BN".

alone, while others named as co-defendants a number of unions that represented BN employees.

The first of the suits filed in this district was by William E. McBride and William H. Butler, Jr., as a system-wide class action.[3] The case was assigned to the docket of Judge John Powers Crowley; the lawyers representing the plaintiffs were from Davis, Miner & Barnhill, a small but experienced Chicago law firm that specializes in civil rights litigation. Among the suits filed in the district court of Minnesota, was a class action by William E. Forbush, against BN and unions representing its employees. Plaintiff and the class in that civil action were represented by Paul C. Sprenger of Sprenger, Olson and Schutes, also a small firm that specializes in civil rights litigation. In both *McBride* and *Forbush* the lawyers undertook representation of plaintiffs and the class under contingency fee agreements.

In *McBride*, plaintiffs moved for class certification to which BN objected. At the same time, EEOC filed a motion to intervene in the case. On December 22, 1978, Judge Crowley granted the plaintiffs' motion for class certification and EEOC's motion to intervene.[4] A little more than a month later, January 31, 1979, Sprenger, representing Forbush in the district court in Minnesota, Barnhill,

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[3] Lead counsel persist in calling this "a nation-wide" class action. However, as this court understands it, Burlington is not a nation-wide railroad corporation, it operates in twenty states, all in the western part of the country. It does not employ workers nation-wide. Therefore, it is more accurate to refer to this suit as "a system-wide class action."

[4] The class was defined as:

> All Negro citizens who have been or will be employed by the Railroad System of the Transportation Division of BNI in the United States and who have been, are being, or as a result of the operation of current policies will be discriminated against in hire and terms or conditions of employment such as seniority, training, promotion, wages, transfers, lay off or discharge because of their race.

representing McBride and Butler, three attorneys in two other cases pending in this district, and Bruce Elfvin, staff attorney for EEOC, appeared before Judge Crowley and proposed an agreed order "concerning the organization of plaintiffs' Steering Committee, Committee of the Whole, and to the designation of Lead Counsel, ..." The proponents stated that their purpose was "to assist the Court in the coordination of this litigation." The duties and responsibilities of the lawyers who were to be lead and co-lead counsel were described and the function of the Steering Committee and Committee of the Whole were defined. Judge Crowley approved the proposed order; it was entered as of the date of its presentation. Sprenger and Barnhill, or Judson Miner of the Barnhill firm, were designated as lead counsel for plaintiffs and the class; Bruce Elfvin was named co-lead counsel.

At the time, the suit in *McBride* had been on file more than one year. Both Barnhill and Sprenger knew the complexity of the cases, the scope of the allegations and charges made against BN, and the difficulties of proof. The lawyers who accepted the responsibilities of lead counsel knew by then the positions that had been taken by BN in the defense of the charges of race discrimination. Neither at the time the order was presented nor at any other proceeding before Judge Crowley was there any statement made by the designated lead counsel concerning the difficulties of proof, the burdensomeness of the cases with regard to expenses, or the obligations assumed by them under the contingency agreements each had entered with their plaintiffs.

Soon after Judge Crowley certified the class in *McBride*, prompted by the pendency of a number of cases in other districts, BN moved before the Judicial Panel on Multidistrict Litigation for consolidation of the cases in order to coordinate pretrial proceedings. On April 11, 1979, the panel ordered the cases transferred to this district and assigned to Judge Crowley as *In Re Burlington Northern, Inc. Employment Practices Litigation*, MDL 374. Thereafter, subsequently filed cases were also transferred

to the district as "tagalong actions." Then in June 1979, twelve of the named plaintiffs in six of the cases against BN, together with EEOC, filed a first consolidated complaint in this district under the case number of *McBride*. This consolidated complaint invoked the provisions of both Title VII and 42 U.S.C. § 1981. The defendants were BN and thirteen unions that represented BN employees.

In the balance of 1979, the parties continued with discovery. Plaintiffs obtained detailed information concerning the railroad's workforce from BN computer tapes and from the Railroad Retirement Board, reflecting BN's yearly reports for the period from the 1970 merger that created BN, to 1980. Based on these tapes, lead counsel caused to be prepared statistical printouts which were served on BN in conjunction with requests for admission and propounded interrogatories. The discovery conducted by lead counsel extended to BN's employment policies and depositions of its regional personnel managers as well as several members of its Human Resources Department staff. Union representatives were also deposed and requests for production of documents were served on defendant unions.

Lead counsel also sought computer tapes and hard copy documents from the unions. These detailed discovery efforts proceeded through the year 1980. During the spring of 1981, Judge Crowley announced he was going to resign from the federal bench, effective as of June 30, 1981. Thereupon, EEOC moved to transfer MDL 374 as the case stood before Judge Crowley to a judge in the United States District Court for the District of Minnesota. The MDL panel ruled in October 1981 that the consolidated cases were to be assigned to this docket for the remainder of the coordinated pretrial proceedings.

These were extensive; typical of litigation like as this one. They included rulings on a multitude of discovery disputes that involved what lead counsel have said were "hundreds of thousands of documents" produced by BN and the union defendants. These documents were stored in two depositories, one in Chicago, Illinois, and one in

St. Paul, Minnesota, established by a pretrial order which Judge Crowley had entered early in the litigation. The depositions involved all of BN's top management personnel, and included responsible officials of the unions. The court was required to rule on a motion filed by BN to redefine the class and one asking for vacature of the order that had permitted EEOC to intervene in the lawsuit. Status hearings were conducted by this court beginning January 22, 1982 and involved the entry of several pretrial orders, one setting out detailed discovery deadlines including dates for exchange of exhibits as well as other matters preparatory to trial. Orders were also entered relating to an appeal from a district court order concerning certain BN witnesses' answers to questions about the railroad's affirmative action program.

By the end of 1982, lead counsel made certain decisions concerning preparation for trial. These included the selection, retention and employment of experts. They decided to retain Dr. Richard Barrett, a well-known testing expert; Dr. Richard Hoyt, an expert in economics who was to testify about the compiled computer data base and on issues of damages; Dr. Stephan Michaelson, a top expert in the interpretation and analysis of race data; Dr. Rebecca Krem, an expert in statistics; Dr. Charlotte Striebel, a Ph.D. in mathematics, who was to testify in rebuttal; and Dr. Herbert Hill, a former NAACP staff member and a recognized student of race discrimination in the railroad industry. Compensation of these experts was assumed by lead counsel in accordance with agreements entered into with each expert.

Throughout the early part of 1983, lawyers for Burlington and lead counsel submitted to the court agreed orders concerning anticipated trial exhibits and other matters. Also, a number of orders were entered allowing intervention of additional plaintiffs, the filing of an amended consolidated complaint, and the transfer to this docket of tagalong cases that had been filed after this court was assigned the multidistrict litigation. In the meantime, the parties proceeded with intensive discovery and final prepa-

ration. The case was set to be called for trial on November 7, 1983 and the final pretrial conference was held October 25, 1983. Then, in the early morning hours of the day of trial, a complete settlement was reached. The parties negotiated a consent decree which received the court's preliminary approval on November 22, 1983, and full approval on April 2, 1984.

Under the terms of the decree, BN agreed to pay $10 million, to be held in a fund for those who claimed, and who could establish, that during the designated period, they had been subjected to racial discrimination in hiring, promotion, or discharge. The fund was non-revisionary so that the full $10 million plus interest it may earn, will be paid to qualified claimants under the consent decree. BN retained no interest in the fund and distribution now depends on the number of claims filed and allowed. The $10 million dollars was deposited soon after full approval of the consent decree and has been earning interest since that time.

Class members entitled to make claims against the fund are defined broadly, thus making them eligible for injunctive relief which requires BN to hire Negroes at specified rates for nine years after approval of the decree. For example, each year BN must hire Negroes as officials, managers, and salespeople at two times the Negro national availability for these jobs as determined by relevant census information. In all other jobs which did not have Negroes equal to their availability in the preceding year, each year BN must hire Negroes at rates ranging from 2 to 1.5 times their availability.

Further, by the terms of the decree, BN must promote Negroes from scheduled to exempt jobs at a rate of 1.5 times their availability for such promotions and it must circulate information about job opportunities in a meaningful manner, particularly to Negro organizations. BN agreed to a priority hiring of rejected Negro applicants for jobs and providing neutral references for those it had previously listed as discharged for cause. The decree provides that all persons who have been locked into certain

lower paying positions—those jobs to which Negroes traditionally have been assigned—have the right to transfer to higher paying positions, and retain the seniority of their lower paying jobs. BN also agreed to train Negroes to be locomotive engineers at a rate of no less than 15% of the persons trained. In the last subdivision of the decree, BN agreed to pay all lawyers for the plaintiffs and EEOC "their costs including experts' fees, and including (except as EEOC) reasonable attorneys' fees. . . ."

Based on this provision, BN has paid EEOC $512,940.33 of an agreed sum of $675,000 and through agreements approved by this court, it has paid ten lawyers for the plaintiffs in the tagalong and related cases a total of $324,200 for fees and advanced expenses. However, no agreement has been reached with lead counsel for plaintiffs and the class, consequently they have filed separate petitions for fees and for reimbursement of expenses.

The lead counsel in this case, as designated by the agreed order of January 31, 1979, are "Charles Barnhill, Jr., . . . or Judson H. Miner" of Davis, Miner, Barnhill & Galland, a three-partner, three-associate law firm located in Chicago; and Paul C. Sprenger of Sprenger, Olson & Shutes, P.A., a three-attorney law firm whose offices are in Minneapolis, Minnesota. Both firms in which lead counsel are senior partners specialize in representing plaintiffs in civil rights and Title VII cases. They and members of their firms are able and experienced practitioners in complex class litigation involving charges of race discrimination in employment opportunities. Charles Barnhill has been principal attorney for plaintiffs in numerous landmark civil rights cases. In fact, he and members of his firm have earned the reputation of being among the leading lawyers in civil rights cases. Paul Sprenger and his firm are recognized as experienced in complex litigation defending and prosecuting civil rights cases, as well as antitrust suits.

Both firms undertake their employment discrimination class actions on a contingency basis, depending on court-awarded fees. As to Charles Barnhill, two judges of this

court have recently held that $170 was a reasonable hourly rate for his services and awarded him that basic rate. Between seventy-five and eighty-five per cent of the law firm hours expended by the Sprenger firm were on a contingency basis. When billing fee-paying clients, it has charged $180 or more per hour for Paul C. Sprenger's services and $160 or more per hour for the firm's other two partners. These private clients have included, among others, the Swedish and West German governments, the Smead Manufacturing Company, the American Lutheran Church, and the Minnesota Education Association. Although there is a dispute between the parties concerning the reasonableness of the rates requested by lead counsel, there is evidence that the rates requested by them are consistent with what lawyers of comparable skill and experience charge for similar services in Chicago and Minneapolis, and what lead counsel could charge for their services in other litigation.

Relevant to these facts, it appears that sometime in 1977, William E. McBride and William H. Butler, Jr., went to the offices of Davis, Miner, Barnhill & Galland about the possibility of their representing them in a class action lawsuit against BN. Charles Barnhill, who conducted the initial investigation, interviewed a number of the company's employees, both Negro and Caucasian, and did research concerning the experiences of Negroes with American railroads regarding discrimination in employment opportunities. He concluded that historically BN, as well as other railroad and railway unions, discriminated against Negroes in hiring, promotions, and other employment practices. He noticed that a number of Burlington job classifications were filled by a disproportionate number of Negroes or Caucasians; that many employment practices were subjective and standardless; and that actual hiring or promotion patterns in the years immediately prior to 1977 could not be determined. Consequently, on January 24, 1978, Barnhill filed *McBride, et al., etc. v. Burlington Northern, Inc.*, No. 78 C 269, in this court, the case which became the hub of all the consolidated actions in this multidistrict litigation.

Later that year, on October 17, Paul Sprenger filed *William E. Forbush, etc. v. Burlington Northern, Inc., et al.*, No. Civ. 4-78-461, in the district of Minnesota, one of the cases that was consolidated in this court with *McBride*. Thereafter, Barnhill and Sprenger, assisted by members of their respective firms, cooperated in handling the two suits. In January 1979, by an agreed order, they were designated lead counsel for plaintiffs and the class. In the six years of litigation from January 1978 to March 31, 1984, they, their partners and associates, worked and adequately documented a total of 12,228.2 attorney hours for which they seek reimbursement in fees. In addition, they ask to be paid for a total of 5,157.8 hours of work by their paralegals. Burlington concedes that the total number of hours claimed is reasonable and properly substantiated. The Barnhill firm advanced $206,672.15 in expenses, the Sprenger firm $925,257.04, which have been properly documented and will be paid by the railroad, subject to its right to seek contribution from the union defendants.

The rates per hour which lead counsel ask this court to award range from $180 for Sprenger, $170 for Barnhill, to $95 per hour for an associate in the Barnhill firm. Each lead counsel asks that the paralegals in his firm be paid $40 per hour. Thus, at the requested rates, the following is the lodestar fee for lead counsel, each lawyer, and paralegals who assisted them in representing plaintiffs and the class.

The Attorney	Total Hours	Hourly Rates	Lodestar Fees
Paul C. Sprenger	3,222.25	$180	$580,005.00
Eric L. Olson	1,206.50	160	193,040.00
Robert L. Shutes	3,227.25	160	516,360.00
SO&S Paralegals	3,587.00	40	143,480.00
			$1,432,885.00
Charles Barnhill	2,918.50	$170	$496,145.00
Judson S. Miner	97.50	170	16,575.00
George F. Galland	5.00	170	850.00
Briget Arimond	1,267.50	110	139,425.00
Nancy J. Anderson	212.50	135	28,687.50
Paul Strauss	71.20	95	6,764.00
DMB&G Paralegals	1,570.35	40	62,834.00
			$751,280.50
	Total Lodestar Fees:		$2,184,165.50

Lead counsel request that these fees be subjected to a multiplier. In their original applications, supported by affidavits of two highly respected academic lawyers, those of a number of practitioners in employment discrimination cases, several from experts, and the testimony of experienced trial lawyers, petitioning counsel had asked for a multiplier of 3.5, but after the matter was heard, the multiplier requested was reduced to 2.5. The following is the amount of fees, the lodestar plus the multiplier, which lead counsel are asking for themselves, their partners, associates, and paralegals.

The Attorney	Lodestar Fees	Requested Multipliers	Amount
Paul C. Sprenger	$580,005.00	2.5[5/]	$1,347,345.00
Eric L. Olson	193,040.00	2.5	478,340.00
Robert L. Shutes	516,360.00	2.5	1,286,340.00
SO&S Paralegals	143,480.00	1.0	143,480.00
			$3,255,505.00
Charles Barnhill	$496,145.00	2.5	$1,186,991.00
Judson S. Miner	16,575.00	2.5	41,437.50
George F. Galland	850.00	2.5	2,125.00
Briget Arimond	139,425.00	2.5	343,695.00
Nancy J.Anderson	28,687.50	2.5	71,718.75
Paul Strauss	6,764.00	2.5	16,838.75
DMB&G Paralegals	62,834.00	1.0	62,834.00
			$1,725,640.00
	Total Fees Requested:		$4,981,145.00

III

A

Despite conceding that the total hours claimed are reasonable, that lead counsel, their partners and associates are able and experienced EEOC practitioners and that they are entitled to an award of reasonable fees which it is willing to pay, Burlington contends that the hourly lawyer rates which lead counsel seek are ten to twenty

[5] From the date of settlement, November 7, 1983 through March 31, 1984, the multiplier requested is 1.0 which does not affect the total lodestar fees for that period.

per cent too high. It argues that an award of attorneys' fees such as is sought in this case should be calculated according to prevailing market rates and that in this process, the burden is on the fee applicant to prove the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Lead counsel, according to Burlington, have not carried this burden; instead, they proceed on a theory of "national" rates which are not relevant to a proper consideration of their petitions.

Petitioning counsel, of course, do not agree. They argue that this record now contains abundant evidence proving that the requested rates are reasonable. They say that the rates they request have been awarded them in the past; that the Sprenger firm charges its hourly-billed clients the rates requested; and that the rates requested are those being charged by attorneys practicing complex Title VII litigation in Chicago, Minneapolis, and across the country. Moreover, lead counsel contend that the hourly rates in question are well below those paid by Burlington to its lawyers, even if allowance is made for the volume discount given Burlington in this case.

As is usual in disputes of this kind, there is some merit in the arguments of both sides. Lead counsel are correct in saying that they and members of their firms are able, experienced, and qualified practitioners in class action suits involving issues arising from race discrimination in employment; in fact, Burlington does not claim otherwise. And, it is true, as they assert, that two judges of this court have awarded Charles Barnhill attorney's fees at the hourly rate he seeks in this case. Burlington argues, however, that those instances did not involve contests over fee awards or, at least, awards that were as vigorously opposed as it opposes the applications of lead counsel here.

While it may be true that the two fee awards to Barnhill were not vigorously contested or were by agreement, this fact would increase their relevancy to this case be-

cause it would show complete agreement, by the judges and the parties, that the rate of $170 per hour was reasonable. In contrast with the Barnhill firm, Paul Sprenger's firm does considerable work on an hourly-billed basis for which the charge per hour is $180 for Sprenger and $160 for the services of his two associates, Olson and Shutes. These are the rates they seek in this case.

It is well settled in this circuit that the object of a fee determination is to simulate the results which would be obtained if the lawyer involved were dealing with a paying client. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1393 (7th Cir. 1985); *Henry v. Webermeier*, 738 F.2d 188, 195 (7th Cir. 1984). This is so because the hourly rate a private attorney ordinarily charges his clients for the hours worked is generally the proper hourly market rate for his services. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7th Cir. 1982). However, if there is no evidence of hourly rates charged paying clients or awarded previously to petitioning counsel, the fee determination should be based on the market rate for the services the lawyer rendered; that is, the rate that lawyers of similar ability and experience in the community normally charge their paying clients for work and responsibility undertaken in similar litigation. *Henry v. Webermeier*, 738 F.2d at 193.

In setting an appropriate fee award on these applications (since the reasonableness of the total hours claimed is conceded), this court must determine whether petitioning counsel have shown that rates they seek are those they charge paying clients, or are ones at which they have been awarded fees, or are the prevailing rates paid to comparable attorneys in the community where they practice. The product of the number of hours multiplied by the reasonable hourly rate is the amount of the reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This is normally the award of attorneys' fees contemplated by Title VII; it is the amount that is presumably reasonable and petitioners for fees have the burden of rebutting this presumption. *Blum v. Stenson*, 104 S. Ct. 1541, 1548 (1984). Burlington, on the other hand, is correct in point-

ing out that the aim of a fees award "is to permit and encourage the redress of the civil rights violations of victims but not to create a civil rights fee bank to be liberally drawn upon by lawyers for their own welfare." *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980); *see also McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 756 (S.D. Ill. 1978).

This latter point leads the court to observe that there is some merit in Burlington's contention that the hourly rates sought by lead counsel are too high. For one thing, the arguments in support of the petitions involve a degree of self-touting. There is justification for the criticism that lead counsel's witnesses on hourly rates, although capable and respected attorneys, disclose little familiarity with petitioning counsel, with this litigation, or with rates charged by similar practitioners in class suits involving claims of race discrimination in employment opportunities.

However, on balance, the pertinent factors having been considered, *see Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), this court concludes that the requested hourly rates are not so high as to warrant their rejection. As to each lawyer involved, there is evidence that the hourly rates requested have either been paid by clients or awarded to them by a court in the past. Contrary to Burlington's contentions, these matters are not subject to precise mathematical determinations. Lead counsel have shown that the Sprenger firm has charged clients the rates requested for Paul Sprenger and his partners; Charles Barnhill, on at least two occasions, has been awarded fees at the rate requested for him. The requested rates approximate, as close as these matters can, the prevailing ones paid to comparable attorneys in the relevant community. In this case this is Chicago, Illinois, for Charles Barnhill or Judson Miner and their associates; Minneapolis, Minnesota, for Paul Sprenger and his partners. *Hensley v. Eckerhart*, 461 U.S. at 433-34 (1983); *Blum v. Stenson*, 104 S. Ct. at 1548. Therefore, for the total hours they worked, to and including March 31, 1984, lead counsel, their partners, associates, and paralegals, are

awarded the hourly rates they ask for. Based thereon, the following are the lodestar fees to which they are entitled.

The Attorney	Total Hours	Hourly Rates	Lodestar Fees
Paul C. Sprenger	3,222.25	$180	$580,005.00
Eric L. Olson	1,206.50	160	193,040.00
Robert L. Shutes	3,227.25	160	516,360.00
SO&S Paralegals	3,587.00	40	143,480.00
			$1,432,885.00
Charles Barnhill	2,918.50	$170	$496,145.00
Judson S. Miner	97.50	170	16,575.00
George F. Galland	5.00	170	850.00
Briget Arimond	1,267.50	110	139,425.00
Nancy J. Anderson	212.50	135	28,687.50
Paul Strauss	71.20	95	6,764.00
DMB&G Paralegals	1,570.85	40	62,834.00
			$751,280.50
		Total:	$2,184,165.50

Burlington will be ordered to pay this total sum in fees to lead counsel, with interest from the date of the order entered in accordance with this memorandum. *Preston v. Thompson*, 565 F. Supp. 294, 297 (N.D. Ill. 1983).

B

Lead counsel, however, do not agree with this determination of the date their fees are to earn interest. They assert that interest on their fees should be calculated from the date this court fully approved the consent decree because that approval fixed Burlington's obligation to pay plaintiffs' attorney fees, and left only the amount to be determined. They argue that, as this court ruled earlier, and as the Seventh Circuit explained in *Gatreaux v. Chicago Housing Authority*, 690 F.2d 601, 612 (7th Cir. 1982), current rates should be awarded to adjust for inflation of the period lead counsel waited for payment of their fees. They point out that almost a year has passed since this court heard evidence on the fee petitions, during which there has been a substantial increase in the costs of living, and some law firms have increased their hourly rates. Accordingly, lead counsel argue that there

should be either an upward adjustment of the hourly rates or interest retroactive to the date the consent decree was fully approved. "This use of current rates simplifies the Court's task and roughly counterbalances the inflationary loss suffered by the attorneys because of the long delay in recovery of their fees." *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978).

Although they do not use the term nor discuss the concept, it is obvious that what lead counsel are asking is prejudgment interest on the fees awarded them. Generally, prejudgment interest in a case governed by federal law is a matter left to the trial court. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1310 (9th Cir. 1982). An award of prejudgment interest is responsive to considerations of fairness; if it will act as a penalty on a relatively innocent defendant, the district court has discretion to refuse to make such an award. *Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1075 (7th Cir. 1975).

Stating the principles of these cases serve to reveal why lead counsels' contentions and arguments on this matter must be rejected. It was they who petitioned for fees at an hourly rate they considered high enough, and requested a multiplier, first of 3.5, and then at 2.5. As they had a right to, they chose to litigate with Burlington the issues thus raised, and defendant, as it had the right to, opposed both the hourly rates requested and the multiplier sought. In other words, this was a good faith dispute originated by lead counsel and joined in, with vigor, by Burlington. Despite the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. at 437, the proceedings on these petitions have developed into just that. This court has permitted a liberal schedule for hearing of evidence and the submission of briefs, memoranda, affidavits, and exhibits. The last filing, one that interfered with this court's ruling schedule, was on September 4, 1985. Lead counsel cannot have it both ways. They cannot elect to litigate, take all the time af-

forded them by the court, and then get interest applied retroactively on a fee award of over $2 million, to the date the court fully approved the consent decree, a period of almost eighteen months. To put it bluntly, what lead counsel argue for, if granted them, would be grossly unfair.

For these reasons, in the exercise of its sound discretion, this court will not order an upward adjustment of the lodestar fees; and, in its judgment, lead counsel are not entitled to interest on fees awarded them retroactive to the date full approval was given to the consent decree. *Cf. Greenspan v. Automobile Club of Michigan*, 536 F. Supp. 411 (E.D. Mich. 1982).

C

This brings up the issue whether the results achieved by lead counsel make this the kind of "exceptional success" that would entitle their being paid not only the lodestar fees but a multiplier as "an upward adjustment" for the legal work they have performed. They argue that on the record there must be a multiplier in order to compensate for the extreme risk they undertook in representing plaintiffs and the class, the delay they have experienced in receiving payment, and the relief, monetary and injunctive, they have obtained for their clients in this somewhat extended employment discrimination case. Lead counsel insist that they have shown by proper evidence, and have demonstrated beyond question, that no lawyer competent to litigate this kind of vigorously defended lawsuit would have been willing to handle the litigation for the normal hourly fee. They point to the huge amount of attorney time they have devoted and to the expenses they have advanced; between them, their two firms have expended a total of $1,131,929.19 in expenses on behalf of evidently indigent litigants. Lead counsel detail the catalog of difficulties they encountered and overcame because of their professional abilities and devotion to the cause of their clients. They now contend that unless Burlington is

ordered to pay a multiplier of at least 2.5,[6] in cases such as this one, enforcement of Title VII will suffer.

Burlington, with an intensity of litigation vehemence its lawyers have not displayed during any other aspect of this controversy, contends that no multiplier should be awarded.[7] It argues that while the consent decree contains significant and appropriate relief, one that some might view as very good or even excellent, this case cannot be regarded as an "exceptional success" as that term has been used by the Supreme Court of the United States. It points out that this was a settlement; the consent decree does not establish any legal precedent benefiting anyone outside of plaintiffs and the class; therefore, the relief granted was not exceptional in the sense of representing a landmark decision. Burlington asserts that while the $10,000,000 it paid into the fund is a large sum of money, the amount must be considered in light of the number of persons who will share in it and who total, according to lead counsel, as many as 20,000. Of these, a substantial portion will receive no money and of those 7,000 to 8,000 who will receive some monetary award, the average amount will be approximately $1,400 to $1,250.

As to the injunctive provisions of the decree, Burlington insists that none is unprecedented, unusual, or otherwise exceptional. The "fill rates" which lead counsel say make

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[6] When lead counsel first filed their petitions for fees, they requested, with detailed arguments, a multiplier of 3.5. But when they submitted their proposed findings of fact and conclusions of law, their requested multiplier, without explanation, was reduced to 2.5.

[7] This is the position Burlington takes in closing brief on the issue of a multiplier or upward fee although its answer to the petitions for fees contains the somewhat vague concession that "[b]ecause this was a large case and involved substantial expenses, some enhancement may be permissible, but under no circumstances should the multiplier exceed 1.15." It is obvious, however, that this statement was made in the context of Burlington's contention that the hourly rates sought by lead counsel should be reduced.

this case an exceptional one are not new and may not result in any increased employment of plaintiffs or members of the class; the "priority hiring" provisions about which petitioning counsel speak so highly actually provide the class with no benefits beyond that given them by the fill rates; and the transfer provisions are, in fact, less significant as relief devices than lead counsel believe. These details of the consent decree, according to Burlington, do not support the claim that in this case lead counsel have achieved that degree of "exceptional success" or that this is a "rare case" so as to justify the multiplier requested.

Hensley v. Eckerhart, 461 U.S. 424 (1983) is the first opinion, as far as this court can ascertain, in which the Supreme Court of the United States, without defining the term, used the expression "exceptional success." There, the Court had before it the issue of whether in a civil rights suit a partially prevailing plaintiff may recover an attorney's fee for legal services rendered in pursuing unsuccessful claims. The Court held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988;[8] and that where a plaintiff achieved only limited success, a district court should award only that amount of fees that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. at 436. In resolving the issue, the Court said, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

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[8] In this case, the award of fees is sought under Section 2000e-5 of Title VII. It was held in *Doe v. Busbee*, 684 F.2d 1375, 1380 n.3 (11th Cir. 1982), that:

> Although the Title VII attorney's fees provision and § 1988 are separate and distinct statutory bases for awards of attorney's fees, both employ the "prevailing party" concept and both have received similar construction.

Then, in *Blum v. Stenson*, 104 S. Ct. 1541 (1984), a 1978 suit filed on behalf of a statewide class of Medicaid recipients, the Court was called upon to decide under what circumstances an upward adjustment of an attorney's fees award based on prevailing market rates is appropriate under Section 1988. It ruled "that the 'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee within the meaning of the statute." *Blum v. Stenson*, 104 S. Ct. at 1548. Referring to its opinion in *Hensley*, the Court said that decision "recognized that 'in some cases of exceptional success an enhanced award may be justified.' " *Id.* at 1548. The burden is on the fee applicant to prove that in the relief obtained there has been "exceptional success." *Id.* at 1550. However, because this burden had not been discharged by Stenson, the Court held that it was an abuse of discretion for the district judge to give a 50 percent upward adjustment in the fee. *Id.*[9]

Again, as in *Hensley*, the Court neither explained nor defined "exceptional success" when used with regard to the relief obtained in a civil rights case. But this is not a technical term; it consists of words that have a common ordinary meaning and there is no reason to believe that the Court used them in any other way. Webster, always a reliable source for the meaning of English words, tells us that "exceptional", an adjective, means "forming an exception: being out of the ordinary: uncommon,

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[9] It appears from the decided cases that the concept of enhancement of a lawyer's fees is referred to sometimes as "a bonus", as "a multiplier", or as "an upward adjustment". In *Blum v. Stenson*, 104 S. Ct. at 1547 n.12, the Court said:

> The District Court characterized the 50% increase as a "bonus." The Court of Appeals, in its brief opinion, spoke of it as an "upward adjustment." As we think the latter characterization is fairer, we will use it.

This court will also use the expression "upward adjustment" but on occasion, to emphasize the point, it will also use the term "multiplier."

rare . . . ." Webster's *Third New International Dictionary* (G&C Merriam Co., 1966). Therefore, for success in a suit like this one to be exceptional, the relief obtained must be out of the ordinary, uncommon, or rare.

In this case, the complaints that McBride and Butler made to Charles Barnhill sometime in 1977 concerned their experiences as Negro employees of Burlington. There was nothing esoteric, complex, or unusual about what they must have told him. They wanted damages for what they said were injuries they suffered from being denied employment opportunities in the Burlington system and they wanted injunctive relief from the alleged race discriminatory policies and practices that infringed their rights as employees of the railroad. Investigation by Barnhill led him to conclude that the claims of the two men could be cast into a class suit.

As to the suit filed by Paul Sprenger for William Forbush, nothing in this record suggests that the complaint made to him was any different; the allegations in the suit filed in the United States District Court for Minnesota were like those made in this court for McBride and Butler. This is just as true of the other suits, the tagalongs and the cases consolidated with this one. The consent decree and the relief it gave McBride, Butler, Forbush, the other plaintiffs, and members of the class, conform to what was sought in the complaints. It gave plaintiffs and the class money, that is, $10,000,000 in settlement. This sum, though large, is not an unusual or an extraordinary amount to be shared by members of a class consisting of as many as 20,000 people, with 7,000 to 8,000 of them being allocated sums ranging from substantial to minimal.[10] In fact, as lead counsel know from cases they have handled,

[10] The named plaintiffs, a total of twenty-three persons, have been allocated sums ranging from $197,595 for McBride and Butler down to $35,000, the minimum given five of them. The class members have been allocated sums under $35,000 and as little as $100, a majority receiving less than $1,000 each.

large, multi-million dollar sums are recovered in employment discrimination class suits.

For example, in *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982), the sum involved $1.5 million as monetary relief for past discriminatory practices, the total class consisting of approximately 3,000 members. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.D.C. 1984), produced a $52 million recovery for a class "of more than 3,300 women employed by Northwest Airlines, Inc. . . ." *Id.* at 7. *In re Southern Pacific Transportation Company Employment Practices Litigation*, MDL 262 (S.D. Tex.), was a settlement that created a $3 million fund for plaintiffs and the class. *Mays v. Motorola*, 18 EPD ¶8902 (N.D. Ill. 1979), was settled before appeal for monetary and affirmative relief valued at $15 million. *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983), a race discrimination class action, resulted in a money judgment in excess of $14 million, described by lead counsel as "the largest backpay judgment in the history of Title VII." The cases vary in their details, but they show that large monetary relief in employment discrimination class suits, although not recovered as a matter of course, is not uncommon. *See generally 4 H. Newburg on Class Actions*, §24.116 (2d ed. 1985).

Lead counsel insist, however, that the dollar value of the settlement fund is not the only measure of the success they achieved in this case. They say that the hiring, promotions and locomotive engineer training provisions of the consent decree have an economic value that make this case "an unprecedented settlement . . .", one that "was the largest pretrial Title VII race settlement that had ever been achieved as of the time it was reached . . .", that they "achieved an extraordinary result . . .", an accomplishment that "was of an unprecedented character." Reply Brief of Lead Counsel at 5, 18, 20, 22. Lead counsel support these appraisals of their work with the affidavit of an expert in economics and with what they say is "a compendium of some of the [newspaper] stories generated by the BN settlement." Reply Brief of Lead Coun-

sel at 23-24. They say that "[t]he BN settlement was one of the lead civil litigation stories of the year. It was reported on national television and scores of newspapers nationwide." Reply Brief of Lead Counsel at 23. Examination of the newspaper articles discloses that most of them reported the April 2, 1984 fairness hearing which this court held on the consent decree; and in a number of them there appeared the information that this case represented the largest civil rights settlement in United States history, the payment of $60.5 million in benefits to thousands of Negroes who had sued Burlington for alleged bias in personnel policies. Charles Barnhill, or a spokesperson for EEOC, was quoted as the source for this value of the settlement.

In reading these articles, the court is compelled to notice that the economic value of the consent decree has never been adjudicated in any proceeding in this case. On April 2, 1984 when the fairness hearing was held, lead counsel were present. Intervenor EEOC was represented by one of its staff lawyers; and Thompson Powers, the lawyer who had represented Burlington in negotiating the consent decree appeared for the railroad. The record shows that Barnhill made the first presentation in support of the consent decree. After a general review of the litigation, he said that an expert, one he and Sprenger had hired, "has valued this injunctive relief conservatively—and I mean conservatively—in excess of $50 million. In sum, the settlement is the largest pretrial settlement ever achieved in a racial discrimination case since the passage of Title VII."[11] Tr. 4/2/84 at 7. When Paul Sprenger spoke, he referred to the affidavit of the expert which expressed the opinion "that the economic benefit to the class of people that we are talking about here is about $60.5 million . . . ." Tr. 4/2/84 at 12.

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[11] This designation refers to the Transcript of Proceedings for April 2, 1984.

When Thompson Powers responded for the railroad, he reviewed his role in the negotiation process, referred to the estimates of the decree's value which Barnhill and Sprenger had made, and then said:

> Plaintiffs are certainly entitled to their own estimate of what they have achieved, and except for its outcome on other stages of the proceeding, the company has little reason to challenge their estimates. But we must observe, as we have in our brief, that we think that their efforts to quantify the injunctive aspects of this decree are highly speculative, are extravagant, and in our judgment, may represent attorney fees puffery.

Tr. 4/2/84 at 33.

Powers made this statement a long time before the petitions for fees were filed by lead counsel; it was somewhat prophetic. The affidavit in support of the petitions is now a part of the record. A reading of it discloses it was prepared to support the representations made to this court and statements made to newspaper reporters by Barnhill and EEOC staff members after the fairness hearing. The expert swore to the affidavit on March 31, 1984 and after describing his relationship with lead counsel, he stated the conclusion "that there are substantial economic benefits to the class from the Consent Decree which will exceed $60 million." This evaluation included the cash, hiring, promotions and locomotive engineer training provisions of the consent decree. On September 8, 1984, the expert issued another affidavit in which he acknowledged a $3 million subtraction error, thus reducing his estimate to $57.5 million.

Burlington counters this opinion with one from an expert employed by its lawyers, and one who comes into the record through an affidavit that exudes exemplary academic qualifications. This expert devotes careful attention to the many errors he says were made by lead counsel's expert when he progressed to his conclusions concerning the economic value of the consent decree. The expert then comes to the conclusion that after weighing all

the economic imponderables, the subtlety of the employment factors, the uncertainties of the speculative business possibilities of the future, and correcting the errors of lead counsel's expert, the economic value of the injunctive provisions of the consent decree could not be worth more than $6 million. Plainly, the views of these experts are in irreconcilable conflict. Of what value are they to this court in its resolution of the issue presented? Actually, very little.

First, there are serious questions concerning the accuracy of the calculations made by lead counsel's expert. As to both experts, they remind this court that it has been patiently waiting for the day when it will hear an expert give an opinion that does not slavishly parrot the case theory of the lawyer who employs him. Second, this court does not need the opinion of experts for it to grasp that the injunctive provisions of this consent decree has a money value; common sense, alone, makes this evident. Therefore, it will, as it may, "substitute its own commonsense judgment for that of the experts." *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970), and discount such testimony entirely. *United States v. Makris*, 535 F.2d 899, 908 (5th Cir. 1976).

The court proceeds, then, on the assumption that the right to fill job vacancies as they occur in the relevant period, to priority hirings and promotions, and to opportunities for locomotive engineer training have an economic value, perhaps not as little as Burlington's expert claims and most likely not as much as lead counsel's expert contends. Contrary to lead counsel's arguments, this kind of relief is not extraordinary or uncommon in employment discrimination class suits. In fact, Section 706(g) of Title VII, 42 U.S.C., Sec. 2000e-5(g), provides that "[i]f the court finds . . . [an employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice as charged in the complaint, . . . [it may] enjoin the [employer] from engaging in such . . . practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hir-

ing of employees, . . . or any other equitable relief as the court deems appropriate." Cases are common where such relief is granted, either in consent decrees or adjudicated judgments. *Cf. EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977); *Officers for Justice v. Civil Service Comm'n, etc.*, 688 F.2d 615 (9th Cir. 1982); *see also* B. Schlei and P. Grossman, *Employment Discrimination Law* 1395-1417 (2d ed. 1983), 1983 Supp. 168-172 (listing and discussion of the leading and current cases).

But while keeping in mind the size and extent of the relief which lead counsel obtained for their clients through the consent decree in this case, this court will follow the admonition that "judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment; a large settlement can as much reflect the number of potential class members or the scope of the defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel." *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (6th Cir. 1977).

Of course, the size of the settlement is not the only feature of this case that should be considered in determining whether lead counsel are entitled to a fee enhancement or multiplier. Consistent with this notion, lead counsel argue that the risk they took in representing plaintiffs and the class were so great that unless their lodestar fees are subjected to an upward enhancement or multiplier, they will not receive the compensation to which they are entitled. They point to the testimony of witnesses as to their chances of recovery. Burlington, according to some of the testimony, "had a better than 50/50 chance to prevail"; other witnesses said that the "chance of [plaintiffs] prevailing was less than 50%." Based on these percentages, lead counsel argue that when they filed and pursued this litigation, they took the risk of not prevailing, and losing all they had put into it. They took the chance that there would be changes in the law, that they would be defeated by Burlington's litigation and settlement strategies, and that they may not have been able to continue financing the suits in the face of heavy costs and

expenses. Despite these risks, lead counsel say they advanced more than $1 million to their clients and devoted thousands of attorney hours, all of which they would have lost had they not obtained the success they achieved in the case. Counsel strongly urge the point that unless they are granted the multiplier of 2.5 they request and thus are compensated fully, competent lawyers in Title VII cases will not take the responsibility of such litigation.[12]

Undoubtedly, this is a broad and sweeping argument. But the court must remind lead counsel that by the lodestar fees awarded them, they, their partners, associates, and paralegals, will receive the top hourly rate they have ever been paid by clients or awarded by a court, for every hour they have worked in this case, going back six years. In addition, lead counsel are being reimbursed, without any issue being raised concerning any item, all the money they have advanced toward the costs and expenses of litigation, a total of $1,131,929.19. Moreover, counsel are being paid at current rate, the top they can request, for hours worked during years they did not command that kind of compensation. The court has done this in order to compensate for the long delay in lead counsel's being paid a fee. It has kept uppermost in mind that when Congress enacted the fee-shifting provisions of Title VII, its purpose was "to ensure 'effective access to the judicial process' for persons with civil rights grievances," *Hensley v. Eckerhart*, 461 U.S. at 429 (quoting H.R. REP. NO. 94-1558 p. 1 (1976)), and that this court must award "fees which are adequate to attract competent counsel, but which do not produce windfalls for attorneys." *Blum v. Stenson*, 104 S. Ct. at 1546.

And as it must, the court has carefully and thoughtfully read the affidavits of the many distinguished mem-

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[12] This multiplier will increase the hourly rate at which Paul Sprenger will be paid to $450; and Barnhill's, to $425. On the average, all the lawyers will be paid $390.47 per hour. Neither Barnhill, Sprenger, nor any partner or associate can claim ever being paid at this hourly rate.

bers of the civil rights and Title VII bar obtained by lead counsel as evidence in these proceedings. It has listened, again carefully and thoughtfully, to the testimony of a distinguished lawyer of this community, one this court knows personally, and the testimony of a scholar, a former NAACP staff member with whom this court became acquainted in the days of the Civil Rights Movement in the 1950s and 1960s. It is unpleasant, even painful, for it to disagree with these witnesses but the court must. It must say it is just not true that unless lead counsel are given the 2.5 multiplier they request in this case, competent lawyers in Title VII cases will be discouraged from undertaking representation of persons with such civil rights grievances. Those who think so either do not know or remember the history of the struggle for equality under law in this country or they have no faith in the stamina and potential of American lawyers to come forward and vindicate, in the courts, the claims of those whose civil rights have been violated. In fact, these consolidated cases prove this point. So many lawyers, most of them advancing costs and expenses, were willing to represent complaining Negro employees of the railroad and so many suits were filed in different United States district courts against it, that Burlington had to seek relief from the Multi-District Litigation Panel.

The lodestar fees which this court has awarded lead counsel, their partners, associates, and paralegals, are presumptively the reasonable fees to which they are entitled. *Hensley v. Eckerhart*, 461 U.S. at 437. It is "the rare case in which an upward adjustment to the presumptively reasonable fee of rate time hours is appropriate." *Blum v. Stenson*, 104 S. Ct. at 1550 n. 18. There is heavy burden on attorneys for prevailing parties who seek to justify any upward adjustment; this burden is met only if there are specific claims based on particular factors and supported by specific evidence. *Thompson v. Barrett*, 599 F. Supp. 806, 815 (D.D.C. 1984). If this burden is met, it is the duty of this court to state with particularity why an upward adjustment is necessary in order that the at-

torneys be adequately compensated. *Murray v. Weinberger*, 741 F.2d 1423, 1428 (D.C. Cir. 1984); *Thompson v. Barrett*, 599 F. Supp. at 815.

Here, however, lead counsel have not met the required burden; they only refer in general terms to the chances the parties had of prevailing. Other than the general agreement among lead counsel's affiants about the difficulties of Title VII cases, there is no specific evidence in support. The fact is, every Title VII case, like civil cases generally, presents the chance of not prevailing. It seems to this court that lead counsel are confusing the difficulties of trial with risk, as that term is used in this area of the law. One need not be a specialist in the hazards of civil litigation to know that if the claims of individual plaintiffs are cast into a 20,000 member class suit against a viable, ongoing, solvent railroad corporation that does business in twenty states, there are chances that plaintiffs will not prevail. Particularly is this true if the corporation is charged with race discrimination against its employees. Corporations, even when they are guilty, do not take lightly to charges that they commit wrongs against those they employ.

Thompson v. Barrett, 599 F. Supp. 806 (D.D.C. 1984), cited by both parties to this controversy, is a good example of what is "exceptional success" in a civil rights case as that term was used in *Blum v. Stenson*, 104 S. Ct. at 1548. Therefore, the case is worth examining in some detail because its facts and the legal principles it represents aid this court in resolving the issue whether, in this case, lead counsel are entitled to an enhancement or multiplier of their lodestar fees.

In *Thompson*, five female employees in the bindery division of the Government Printing Office (GPO), on May 25, 1973, filed an administrative complaint on behalf of approximately 325 Journeyman Bindery Workers ("JBWs") employed by the GPO. They alleged Title VII and Equal Pay Act violations, and access violations under Title VII. They sought reclassification of all JBWs as Bookbinders,

with pay commensurate with that reclassification. They also sought monetary and injunctive relief for what they alleged were illegal and discriminatory impediments to JBWs becoming Bookbinders. They lost the administrative proceedings, GPO finding that the females, and those on whose behalf they had filed the administrative complaint, were not victims of sex discrimination.

Then on July 24, 1974, a class suit was filed in the United States District Court for the District of Columbia. Again, as in the administrative complaint, plaintiffs relied, *inter alia*, on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d); and Executive Order 11478, 34 C.F.R. 12985, as amended. Plaintiffs alleged a broad pattern and practice of discrimination on the part of GPO extending to all class of plaintiffs; they sought injunctive, declaratory, and monetary relief, both prospective and retrospective.

When the case was filed, it was the first in that district to seek the use of quotas as a remedy for discrimination; it was one of the very few cases in the nation that challenged an established apprenticeship program; it was the first case to seek a determination that Equal Pay Act violations occur when males and females operated different machines; and it raised several important questions regarding the retroactive and prospective effect of Title VII and the Equal Pay Act. The case first went to trial before the judge to whom it was assigned and at the close of plaintiffs' case, he granted summary judgment in favor of the government on the Equal Pay Act claims. The case was then tried to a conclusion but no decision was rendered because the judge died before making the requisite findings under Title VII. The case was randomly assigned to another member of the court. That judge, after careful consideration, ruled that plaintiffs were entitled to a new trial on all issues and after discovery and pretrial proceedings, a second trial began on March 7, 1979. On October 1, 1979 a memorandum opinion on the issue of liability was issued. In it, the court held that Grade 4

JBW plaintiffs who operated Smyth Sewing Machines were entitled to relief under the Equal Pay Act, and that all plaintiffs were entitled to relief under Title VII on the grounds, among others, that the four-year apprenticeship program was unnecessary and constituted a violation of Title VII as applied to the plaintiffs, and that the classification of all plaintiffs differently from Bookbinders also violated Title VII.

On May 20, 1980, a relief order was issued, together with a supporting memorandum which ruled that the plaintiffs were entitled to back-pay relief under the Equal Pay Act and Title VII, prior to the effective date of those statutes, that they were entitled to hiring preferences over males until fifty percent were women, and other prospective relief. The government appealed. On April 27, 1982, the Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision in almost every respect. *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982). The court remanded for the narrow ground of refashioning the quotas or goals which the trial court had established and for revising the formula for front pay to make it consistent with the formula used for rewarding back pay for Title VII access violations. Although the government petitioned for an extension of time in which to file a petition for rehearing before the court of appeals, the motion was denied; GPO did not seek certiorari review by the Supreme Court. Then, the lawyer who had filed the case originally, and two others, petitioned for fees and costs through June 25, 1982. Request was made for two separate fifty percent upward adjustments to the lodestar amount, the first for exceptional risk involved in handling the case; the second for the exceptional results obtained.

The court first analyzed the claim of the lawyers that the risks involved justified an upward adjustment of the lodestar fees. After applying recent case law, decisions of the Supreme Court and of the circuit, and looking at the evidence presented in support of the request, the court found that plaintiffs had less than a nineteen per-

cent chance of success. It reviewed the history of the case, the first trial and the adverse ruling on the Equal Pay Act claims, the success of the plaintiffs in second trial, the appeal by the government, and the affirmance of the trial court in almost every respect. The court ruled that the lawyers had established grounds for a fifty percent upward adjustment of the lodestar fees for the risks involved in their handling the case.

Then it turned to the question whether the attorneys had met the burden regarding award of an upward adjustment for exceptional success. On this point, the court reviewed the results obtained. First, the monetary awards, for a class of 382 women, totalled more than $20 million; second, the "case resulted in many other improvements in the plaintiffs' workplace, including elimination of the 4-year apprenticeship requirement for bookbinders and the opening of the door for women and other minorities to achieve supervisory status." *Thompson v. Barrett*, 599 F. Supp. at 816. The court noted that the case set precedents in many areas which were unclear when the suit was filed. It was the first one in the circuit to use quotas as a remedy for employment discrimination; it was one of the very few cases in the nation that successfully challenged an established apprenticeship program; it was the first case to hold that Equal Pay Act violations can occur when males and females operate different machines in the bookbinding industry; and the case resolved several important questions regarding retroactive and prospective effect of Title VII and Equal Pay Act provisions. The court went on to say that

> Even beyond this, the impact of this suit has affected the entire printing industry. Sex-segregated unions have merged together. The shock waves of this case have spurred inquiries and investigations into the work environment of all public and private printers. This was certainly an exceptional case, with far-reaching impact on the entire business or profession.

Id. The court awarded the prevailing attorneys a twenty-five percent upward adjustment to the lodestar fee for exceptional results. The fee as adjusted for the three lawyers, one of whom had been in the case for twelve years from the date of the original filing, their associates and paralegals, totaled $1,566,232.50. In summarizing the reasons for his ruling, the able and experienced district judge said, without equivocation, that "[i]n every respect, this case represents an outstanding example of tenacious advocacy, the making of new law, and doing so in the face of extreme odds and in the finest tradition of legal advocacy at its very best." *Id.* at 808.

Nothing like this can be said of this case. It is not one that invoked any new theory of law; the risks were not as great; it did not create any new form of remedy for race discrimination victims in the area of employment; it did not establish any new rule of law; and in fact, the relief, in terms of money and employment opportunities, was spectacularly greater in *Thompson* than in the case at bar. Of course, lead counsel here deserve, and they are extended, the commendations of this court for the good work they have done and for that they are being paid reasonable and adequately compensatory fees.

The court is constrained to conclude, therefore, that this is not the kind of "exceptional success" that would entitle lead counsel being paid not only the lodestar fees awarded but in addition any multiplier as "an upward adjustment" for the legal work they have performed. They have not carried the burden of proof imposed on them by the cases; therefore, a multiplier, of any amount, would be improper. *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984); *Strama v. Peterson*, 669 F.2d 661 (7th Cir. 1982); *see also Laffy v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1985); *cf. Jones v. Central Soya Co.*, 748 F.2d 586 (11th Cir. 1984). On the evidence lead counsel have introduced, it would be an abuse of discretion for this court to grant an upward adjustment of the lodestar fees. *Blum v. Stenson*, 104 S. Ct. at 1550.

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Having thus concluded, and the amount of attorneys' fees and expenses having been determined,[13] the remaining issue is whether the thirteen union defendants[14] should be ordered to assume responsibility for some portion of the fees and expenses which are ordered paid to counsel for plaintiffs and the class. Burlington contends that this should be done because some of the fees and expenses are attributable to seniority issues on which plaintiffs are the prevailing parties. The unions do not agree; they contend that no portion of the fees and expenses should be their responsibility because (1) the applications for fees and expenses by lead counsel were not filed against them; (2) that under *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), Burlington is not entitled to any contribution of fees and expenses from them; and (3) in any event, plaintiffs were not "prevailing parties" as to the unions.

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[13] The amount to be paid lead counsel will include their claimed expenses. But since Burlington agrees that the amount of expenses shown in the petitions is fair, reasonable, was advanced by lead counsel, and that it will pay them, the court will not include the expenses in the order to be entered. This is without prejudice to lead counsel to apply for an order concerning expenses, if, for some reason, this becomes necessary.

[14] The unions who have been defendants in this case, and who joined in the consent decree are: (1) Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees; (2) Brotherhood of Locomotive Engineers; (3) Railroad Yardmasters of America; (4) Brotherhood of Maintenance of Way Employees, AFL-CIO; (5) Brotherhood of Railway Carmen of the United States and Canada, AFL-CIO; (6) International Association of Machinists & Aerospace Workers; (7) International Association of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO; (8) International Brotherhood of Electrical Workers, AFL-CIO; (9) International Brotherhood of Firemen & Oilers, AFL-CIO; (10) Sheet Metal Workers International Association, AFL-CIO; (11) American Train Dispatchers Association, AFL-CIO; (12) United Transportation Union, AFL-CIO; (13) Brotherhood of Railroad Signalmen, AFL-CIO.

These contentions require an examination of the consent decree, and particularly, the provisions relating to anticipated attorneys' fees and expenses. Article IX states, in part, that:

> BN will not dispute the entitlement of counsel for private plaintiffs and EEOC to reasonable costs, including (except as to EEOC) reasonable attorneys' fees, as provided [in the consent decree], on any issue but may seek apportionment of those costs and fees among all defendants or contribution from the unions for allocable portion of those costs and fees.
>
> The defendant unions do not agree that private plaintiffs and EEOC are entitled to any costs and fees from them. The defendant unions may make whatever objections they deem appropriate to the private plaintiffs' and the EEOC's petition as well as to any effort by BN to secure apportionment of contribution for an allocable portion of those costs and fees.

An addendum to the decree, agreed to by the unions, in part provides:

> Plaintiffs' counsel will seek costs and fees with respect to the hiring and discipline/discharge issues, including claims as defined in paragraph II.B.2 (page 4) of the Decree, from BN only. As provided in Part IX of the Decree, BN does not dispute the entitlement of counsel for private plaintiffs and EEOC to reasonable costs as determined under Part IX, including (except as to EEOC) reasonable attorneys' fees, as to those issues. BN will not seek apportionment of or contribution towards the costs and fees relating to the issues specified in this paragraph from the unions.

Clearly, under these provisions, it was contemplated that fees and expenses would be sought from Burlington; that the railroad would then seek apportionment among and contribution from the unions; and that the unions preserved the right to object to any apportionment or contri-

bution. Therefore, the procedure used here, namely, lead counsel seeking their fees and expenses from Burlington with the railroad seeking allocation among the unions, is as provided for by Article IX and the addendum to the consent decree. For these reasons, lead counsels' filing their petitions only against Burlington does not prevent the unions from being ordered to assume some responsibility for the fees and expenses of this case.

The unions' reliance on *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981) is misplaced; the facts there are clearly distinguishable from the ones at bar. *Northwest Airlines* is a case in which an employer was found liable for violations of Title VII and brought suit against a union representing its employees, seeking contribution for money damages the employer was required to pay in Title VII damages. The union was not a defendant in the underlying litigation. The Supreme Court held that an employer cannot maintain an action for contribution toward Title VII damages against a union which was not a defendant in the suit that resulted in a money award against the employer. This case is different. Burlington is not seeking contribution from non-party unions toward damages it has agreed to pay; it seeks an allocation of attorneys' fees and expenses it must pay lead counsel for plaintiffs and the class. And, more importantly, the unions are, and have been for years, defendants in this litigation; the question of attorneys' fees and expenses is all part of the suit in which the unions have participated.

As was noted in *Northwest Airlines*, a district court has broad power under Section 706(g), 42 U.S.C. Section 20002-5(g) to fashion relief against all defendants in a Title VII action. 451 U.S. at 93 n. 28. These defendants being unions does not immunize them from their obligation, imposed by statute, to pay reasonable attorneys' fees and costs to a prevailing plaintiff. Numerous reported decisions have allocated attorneys' fees awards among employer and union defendants. *See, e.g., Sagers v. Yellow Freight Systems*, 529 F.2d 721 (5th Cir. 1976); *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *Rogers v.*

International Paper Co., 510 F.2d 1340 (8th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Vulcan Society v. Fire Dep't of White Plains*, 533 F. Supp. 1054 (S.D.N.Y. 1982); *Walker v. Ralston Purina Co.*, 409 F. Supp. 101 (M.D. Ga. 1976) and *Harsiton v. McLean Trucking Co.*, 62 F.R.D. 642 (M.D. N.C. 1974). In all of these cases, union defendants were held responsible for portions of attorneys' fees and costs. This being a Title VII action, the union defendants in this case are similarly responsible for allocable portions of attorney fees and expenses, if they were prevailed against by plaintiffs.

Some of the unions contend, however, that plaintiffs are not "prevailing parties" as to them. For example, the Brotherhood of Railway and Airline Clerks (BRAC), has presented evidence to the effect that on November 6, 1975, it signed an agreement with the National Railway Labor Conference, consisting of all United States Class I Trunk Rail Carriers, including Burlington, which gave Negro employees a special opportunity to transfer from a BRAC craft to any other craft, if permitted by the employer-carrier. In such transfers, Negro transferees retained fallback seniority and any employee transferring into a BRAC class or craft would bring with him or her all previous seniority. BRAC claims that these transfer provisions were equal or superior to the relief obtained by the consent decree and that signing it was a gratuity on BRAC's part, thus resulting in plaintiffs not being prevailing parties. United Transportation Union (UTU), contends that the special transfer provisions of the consent decree do not affect its practices or benefit its members; therefore, plaintiffs also are not prevailing parties against it.

It is axiomatic that a plaintiff must be a "prevailing party" in order to recover attorneys' fees and costs in a civil rights suit, the standard for making this threshold determination being that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some

of the benefits the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. at 433 (quoting *Nadeau v. Helgemde*, 581 F.2d 275, 278-79 (1st Cir. 1978)). This standard has been said by the Supreme Court to be "a generous formulation." *Id.*

It is well established that the consent decree in this case is a contract enforceable against all the parties to it. *Dunaway v. Storm*, 334 N.E. 2d 825, 829, 30 Ill. App. 3d 880 (5th Dist. 1975); *cf. Dotson v. United States Department of Housing & Urban Development*, 731 F.2d 313, 318 (6th Cir. 1984). This includes the unions; they were defendants to the suit, they participated in negotiating the decree, and they signed it. The special transfer provisions require the unions to modify their procedures and practices with respect to fallback seniority and while this relief is less than what plaintiffs initially sued for, it "achieves some of the benefits [they] sought in bringing suit." It is true that this case was not the "exceptional success" which entitle lead counsel to an upward adjustment of their lodestar fees but the results obtained against the unions were still significant enough to support the conclusion that plaintiffs have prevailed against them.

With regard to BRAC's prior transfer agreement, a reading of it reveals it did not apply to Negro employees hired by Burlington after August 31, 1971, while members of the class in this suit include Negro employees hired after that date; therefore, the consent decree requires BRAC to change its seniority practices with respect to such employees. Similarly, while the special transfer provisions of the consent decree may not affect members of United Transportation Union directly, they can be used by members who began work before 1978 in a non-UTU job. In such a case, UTU will have to modify its seniority retention provisions as to those members of the class in this suit.

Nor is there merit to the position of the unions that they were merely nominal defendants in this suit, and, therefore, are in no way responsible for any portion of

the fees and expenses which Burlington must pay to lead counsel. They were active throughout this civil action. They conducted discovery, objected to discovery requests, and made a number of motions, including one by BRAC and UTU with supporting memoranda urging grant of Burlington's motion to redefine the class, one denied by this court and described by lead counsel as a critical ruling in this litigation. While it is true that Burlington was the principal defendant, the unions were more than just nominal ones. It is also true that plaintiffs were significantly more successful in the relief obtained against Burlington; still, they obtained enough success against the unions to be considered "prevailing parties" as to them. Accordingly, the court concludes that the thirteen union defendants should assume responsibility for a portion of the fees and expenses of this case. The remaining question is what should be that portion.

The consent decree provides that Burlington is to bear full responsibility for all fees and expenses related to litigating issues concerning hiring, discipline, and discharge. The parties agree that if any allocation is made, the unions should be responsible only for a portion of the fees and expenses attributable to seniority-related issues. In its post-hearing memorandum, Burlington proposes that the unions pay one-half of the fees and expenses which, based on lead counsel's records, are clearly attributable to seniority-related issues. It contends that this division would understate the union's fair share of the fees and expenses, and that an additional allocation of ten percent of the sums not clearly attributable to seniority-related issues should also be paid by the unions. Its reasons for this additional allocation are three-fold. First, though generally detailed, not all of lead counsel's expense and fee entries provide enough information to determine whether seniority-related issues are involved. Second, some items have application to many issues; for example, lead counsel incurred substantial expense for statistical analysis of Burlington's workforce, and some of that analysis surely related to seniority issues. Third, there were many activ-

ities in this litigation, like attendance at status calls, which concerned the entire case, not only Burlington.

This court, on review of Burlington's proposal, finds merit in the suggested allocation. Fifty percent of the fees and expenses clearly attributable to seniority-related issues appears to the court to be an accurate, fair, and equitable allocation. The court also agrees that ten percent of the fees and expenses not clearly attributable to seniority-related issues should be allocated to the unions. As is the case in any litigation involving multiple defendants, portions of the time spent by lead counsel, such as attendance at status calls, is attributable to all issues in the suit, and some of the expenses borne by plaintiffs' counsel have application to all defendants.

With respect to the actual allocations, it appears that one attorney, Bridget Arimond of the Barnhill firm, was assigned the task of preparing plaintiffs' case on the seniority-related issues. Therefore, fifty percent of her fees should be allocated to the unions. As to the remaining attorneys with both firms, the record does not clearly disclose what portions of their hours were related to the subject of seniority; for this reason, a straight ten percent of their fees should be allocated to the unions. A review of the expenses does not disclose which are clearly attributable to the subject of seniority; therefore, ten percent of the expenses should be allocated to the unions. Based on this formulation, the lodestar fees and expenses are apportioned between Burlington and the unions as follows.

FEES

Attorney	Lodestar Fees	BN's Share*	Unions' Share*
Paul C. Sprenger	$ 580,005.00	$ 522,004.50	$ 58,000.50
Eric L. Olson	193,040.00	173,736.00	19,304.00
Robert L. Shutes	516,360.00	464,724.00	51,636.00
SO&S Paralegals	143,480.00	129,132.00	14,348.00
Subtotal:	$1,432,885.00	$1,289,596.50	$143,288.50
Charles Barnhill	$ 496,145.00	$ 446,530.50	$ 49,614.50
Judson S. Miner	16,575.00	14,917.50	1,657.50
George F. Galland	850.00	765.00	85.00
Briget Arimond**	139,425.00	69,712.50	69,712.50
Nancy J. Anderson	28,687.50	25,818.75	2,868.75
Paul Strauss	6,764.00	6,083.60	676.40
DMB&G Paralegals	62,834.00	56,550.60	6,283.40
Subtotal:	$ 751,280.50	$ 620,382.45	$130,898.05
Total:	$2,184,165.50	$1,909,978.95	$274,186.55

*Allocated 90% to BN and 10% to the unions, with the exception of the fees of Briget Arimond.

**Briget Arimond's fees are allocated 50% to BN and 50% to the unions.

EXPENSES

Attorney	Actual Expenses	BN's Share*	Union's Share*
Paul C. Sprenger	$ 763,852.95	$ 687,467.65	$ 76,385.30
Charles Barnhill	206,672.15	186,004.94	20,667.21
Total:	$ 970,525.10	$ 873,472.59	$ 97,052.51

*Allocated 90% to BN and 10% to the unions.

IV

For the reasons stated, lead counsel, their partners, associates, and paralegals, are awarded lodestar fees totaling $2,184,165.50 to be paid to them by Burlington. This court finds this sum is reasonable. Of this total sum, Paul C. Sprenger shall be paid $1,432,885.00 from which he shall pay his partners and the paralegals of his firm in the amounts shown at the end of Part III-A, page [C-17] of this memorandum, if they have not already been paid. Charles Barnhill or Judson S. Miner is entitled to receive $751,280.50, from which sum, his partners, associates, and the paralegals of his firm shall be paid the amounts shown at the end of Part III-A, page [C-17] of this memorandum, if they have not already been paid. In addition, as Burlington has agree, lead counsel are to be reimbursed their advanced expenses totaling $1,131,929.19: $925,257.04 to Sprenger, and $206,672.15 to Barnhill or Miner.

The unions' share of the fees and expenses being paid by Burlington to lead counsel is $371,239.06. Of the fees paid to Sprenger, $143,288.50 is allocated to the unions and of the sum paid to Barnhill or Miner, $130,898.05. Of the expenses paid to Sprenger, the unions are allocated $76,385.30 and of the expenses paid to Barnhill or Miner, the unions shall pay $20,667.21. The thirteen union defendants shall pay the share of fees and expenses allocated to them equally, so that each will pay to Burlington the sum of $28,556.85 which is 1/13th of the allocated share.

Within ten days of the date of the applicable order entered pursuant to this memorandum, the unions shall each pay to Burlington their apportioned share of the allocated fees and expenses. If, at the end of the ten-day period, such payment has not been made, then Burlington may move the court for entry of a judgment, jointly and severally, against all of the unions who have not paid their portion of the allocated fees and expenses, unless the parties shall have agreed to an extension of the ten-day period. If such judgment is entered, execution shall follow as by statute and laws provided. Appropriate judgment

orders, in accordance with the findings and conclusions contained in this memorandum, will issue, conforming with the provisions of Rule 58(1), Fed.R.Civ.P.

So ordered,

/s/ GEORGE N. LEIGHTON
United States District Judge

Dated: SEP 20 1985

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. MDL 374
No. 78 C 269

IN RE BURLINGTON NORTHERN INC.
EMPLOYMENT PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

AFFIDAVIT OF FRANK H. EASTERBROOK AND ROBERT A. SHERWIN

We have been asked by the lead counsel for the plaintiffs in this case to evaluate their request that the fees they seek be increased by a significant multiplier. As we understand the contentions of the parties, lead counsel seek a multiplier of 3.5, while counsel for the defendant maintain that the multiplier should be no greater than 1.2 and ought to be 1.0.

Our conclusions may be summarized as follows: (1) in order to induce competent counsel to take difficult litigation of this sort, it is necessary to offer the prospect of fees that will make them at least as well off as if they worked at their market rates for clients who paid when billed; (2) when payment will be delayed and there is a

risk of nonpayment or payment at a level insufficient to meet the market value standard, it is necessary to increase the payment (to award a multiplier) so that the anticipated remuneration equals the market rate; (3) this case was marked by both delay and substantial risk. We therefore conclude that a substantial multiplier is in order. Because of the judgmental quality of such assessments, we cannot prove that a multiplier of 3.5 is "right;" on the other hand, we are confident that a multiplier of 1.2 is far too low.

Before we turn to the considerations that have produced this assessment, we offer short descriptions of our qualifications. Frank H. Easterbrook is the Lee and Brena Freeman Professor of Law at the University of Chicago and a Principal of Lexecon Inc. He had an extensive appellate practice in the Office of the Solicitor General before beginning to teach, a practice that included civil rights cases from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 118 (1976). Since joining the faculty at Chicago he has written, taught, and practiced extensively in economic fields such as antitrust, regulation, and securities, including issues of procedure. Trained in economics and the author of many economic articles, he is an editor of the Journal of Law and Economics. Robert A. Sherwin also is a Principal at Lexecon, where he specializes in the legal and economic aspects of antitrust and other regulatory matters. He has assessed the economic issues in discrimination cases and many other kinds of litigation. He, too, is trained in economics as well as law and is the author of economic articles. The cirriculum vitae of both authors of this affidavit are attached.

I

We start from the proposition that the enforcement of the civil rights laws depends on the willingness of high quality lawyers to devote their careers to that field. Private cases are an essential aspect of civil rights en-

forcement, and Congress recognized the importance of counsel when it enacted the statute requiring defendants to compensate prevailing plaintiffs' counsel. Defendants frequently hire experienced law firms who can staff the cases with the best and the brightest of the private bar. Unless the structure of legal fees attracts equally talented and dedicated counsel to the plaintiffs' bar, the civil rights laws cannot be enforced properly.

Yet good lawyers need not work for plaintiffs, indeed need not work in civil rights law at all. There is no shortage of demand for lawyers willing to do corporate bond indentures, and firms offer handsome rewards to top-quality lawyers who spend their lives in corporate and commercial work. Any lawyer with the talents needed to do civil rights litigation also has the talents needed to do high-paying corporate work.

The corporate lawyer (or the defense lawyer in civil rights work) renders monthly bills and expects to be paid promptly. Usually he is. It is comforting to know that one's client is solvent, one's work appreciated, one's rates high, one's financial status secure. The lawyers for Burlington Northern know this. Yet they do not claim to possess special skills. The civil rights bar *could* obtain the same financial security by doing the same kind of work that large firms do. In order to induce equally talented lawyers to represent penurious clients in civil rights cases, it is necessary to offer these lawyers the same *anticipated* rewards they could obtain by working for solvent clients who pay when billed.

In other words, the objective of the fee process in civil rights litigation is to pay the plaintiffs' lawyer over the run of their civil rights work the same overall compensation they could obtain if they devoted the same time to solvent clients in work of equal difficulty. If counsel perceive that, on average, they will get less by doing plaintiffs' work, they will devote their skills to other legal matters, and civil rights enforcement will suffer.

This is the market value approach to the calculation of fees. The court must assess how much the lawyers could have earned had they taken other work. True, this may be a difficult task; after all, the lawyers did not take other work in fact, and they did not have paying clients who policed their hours and rates. The court thus must serve as a kind of surrogate general counsel for the class, ensuring that the lawyers bill only the hours, and charge the rates, that they could have obtained in private employment. But the objective is clear enough—to find the amount these lawyers could have earned from paying clients, and to ensure that they anticipate making at least that amount in civil rights litigation. We understand this to be right not only as a matter of economics but also as a matter of law. *Blum v. Stenson*, 104 S. Ct. 1541 (1984); *Henry v. Webermeier*, No. 83-2228 (7th Cir. June 19, 1984) (slip op. 9: "the object of the judicial fee determination is to simulate the results that would obtain if the lawyer were dealing with a paying client"; see also slip op. 7, discussing why the lawyer's opportunity cost—what he could earn in other endeavors—is the basis of his fee in civil rights litigation).[1]

II

What a lawyer would obtain if he were "dealing with a paying client" depends on how the client promises to compensate that lawyer. Consider three cases. In Case 1 the client says: "I will pay you promptly for every hour you reasonably and productively spend in the service of

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[1] This is the method Richard A. Posner used in the affidavit that was attached to lead counsels' application for fees. We have reviewed that affidavit and endorse its method of computing fees and multipliers. Defendants' response (Burlington Northern Preliminary Response 21 n.45)—that Professor Posner's affidavit is "an interesting exercise in academic reasoning [that] does not state the current law"—disregards the fact that Judge Posner's opinion in *Henry v. Webermeier* adopts for the Seventh Circuit the fundamentals of Professor Posner's affidavit.

my cause." In Case 2 the client says: "I will pay you only if my side wins; in that event, I will pay you for every hour you reasonably and productively spend in the service of my cause." In Case 3 the client says: "I will pay you only if my side wins; in that event, I will fight tooth and nail to ensure that you get as little as possible, contesting your rates and hours at each opportunity." If these promises were contracts, freely entered into between lawyer and client, how much would the hourly rate be in each case?

Case 1 is simple. The lawyer would get his regular hourly rate—whatever rate he could obtain by working for some other client on matters of equal difficulty. We suppose for the moment that this is $100 per hour.

Case 2 is harder, for two reasons. First, we need to know how likely it is that the client's cause will prevail. Second, we need to know how long it will take to resolve the case. If the client has a 50% chance of prevailing, then the lawyer will demand at least $200 per hour. The lawyer knows he can get $100 per hour with certainty from paying clients, so he will not take Case 2 if he anticipates an average rate of less than $100. If the chance of prevailing in Case 2 is one in three, the lawyer will demand at least $300 per hour. Again, if he receives less, he will prefer to handle clients who pay by the hour when billed.[2] But $300 will be the bare minimum. The $300 just makes the lawyer indifferent between the certain payment from regular clients and the risky payment from this case. If the case is not resolved for some time, the lawyer needs still more compensation to make him indifferent. Suppose the lawyer expects Case 2 to take five years to resolve. If the lawyer had $300 to invest in year 1, and investments return an average of 10% per year, he will have

[2] The formula for computing the hourly rate in Case 2 is OR/p = CR, where OR is the ordinary rate, p is the probability of prevailing on the merits in Case 2, and CR is the contingent rate (the amount demanded per hour to handle Case 2).

$438.15 at the end of five years.[3] So in order to induce the $100 lawyer to take the case, the client in Case 2 would have to offer *at least* $438.15 per hour.

Other considerations, to which we return later in this affidavit, would require still higher payments. For now, though, we offer this single point: in order to make a lawyer indifferent between a present certain payment and a delayed contingent payment, the client must offer that lawyer a substantial multiplier (here 4.83). The riskier the recovery, or the longer the delay, the higher the multiplier must be. And recall that this multiplier arises in a hypothetical arms-length bargain between lawyer and client. The client in Case 2 has negotiated this multiplier voluntarily. Any lower offer would cause the lawyer to turn to other work. Because the objective of the fee process in civil rights litigation is to mimic this hypothetical arms' length bargain, a multiplier is necessary here too.

Of course, Case 3 is more like the civil rights litigation than is Case 2. The difference is that the "client" in Case 3 does not meekly pay when billed at the end of the case. The $100 fee from Case 1, and the $483 fee from Case 2, were amicable fees agreed on by parties on the same side of a case. A lawyer who demanded $483 from a cooperative client would demand far more from one known to resist payment with all available weapons. If the client's resistance turned the probability of full recovery from one in three to one in four, then the "basic" fee would rise to $400 per hour, and the final fee (after accounting for the time value of money during the delay) to $644.20. The multiplier in the no-cooperation case thus rises from 4.8 to 6.4.

Two more observations before turning to an analysis of the risk in this case.

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[3] The formula here is $FR = CR \# (1 + i)^n$, where i is the annual rate of interest expressed in decimal form (10% = .10), n is the number of years payment is delayed, CR (as before) is the contingent hourly rate computed from the formula in note 2, and FR is the final hourly rate.

First, the risk of the litigation must be computed at the start, before the lawyer invests the hours. When deciding whether to work on Case 2, the lawyer asks: "What am I *likely* to be paid?" He answers that question by looking at the risk as things stand at the time he makes the commitment. If the chance of success—sufficient success to assure payment of all fees—appears to be one in two, then the lawyer will seek $200 per hour plus compensation for delay in payment.

The assessment of risk at the beginning will be crude. In every case there comes a point at which counsel may make a more confident assessment. Burlington Northern argues that in this case, for example, lead counsel ultimately gathered enough evidence that they were confident of success. Burlington Northern's response to the application for fees quotes many statements by lead counsel to show that they had amassed evidence giving good prospects of success. But of course this is always true in cases that end in victory for the plaintiffs. Cases won at trial could be described (in the light of hindsight) as "sure winners," and cases settled favorably to the plaintiffs were probable winners. This observation does not detract from the assessment of risk that follows. For every case in which the plaintiffs' case grows strong with time, there will be others in which the initial hopes vanish. In such cases counsel receive no compensation. If the defendants in cases won by plaintiffs could say "This was a good case, so do not use a multiplier," while defendants in cases lost by the plaintiffs need never pay, then counsel for the plaintiffs would turn away from civil rights work. They could not be paid when they lost, and they would not get risk compensation when they won. This is why the calculation should depend on *anticipated* risk at the time the case began—or the time the bulk of the hours were sunk—rather than risk at the last stage before trial.[4]

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[4] Burlington Northern points out that risk changes over time. We agree. Thus if the probability of success was one in four when

(Footnote continued on following page)

Second, we have pointed out how delay in payment calls for a substantial multiplier. In Case 2, delay changed the multiplier from 3.0 to 4.83. The use of a multiplier to compensate for delay is only one way to take the time value of money into account. Another, rougher method is to bill all hours at current rates. In this case, for example, lead counsel seek compensation for all time at the rates they would charge for work done in 1984. The theory is that hourly rates increase with time. Payment of $150 per hour in 1984 for an hour worked in 1980 is a method of handling the delay in payment, if the lawyer's hourly rate in 1980 was suitably lower.

It turns out, however, that the current-rate method of billing for time may substantially understate the compensation for delay in payment. The increase in a lawyer's rates reflects two things: inflation and an increase in experience. Investments usually grow faster than inflation, however, and recent years have seen especially large gaps between inflation and the rate of return on capital (called the "real rate of interest"). Since 1979 the average rate of return on capital has been about 15% annually, while the rate of inflation has averaged less than five percent.[5]

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[4] *continued*
the case began, but counsel almost immediately found a "smoking gun," the probability of payment for work done thereafter is higher and the risk factor lower. If, on the other hand, counsel labored for years before everything fell into place, all hours should be treated as at the original risk. We do not attempt to determine how the risk of non-payment changed over time in this case. But if, Burlington Northern now says, there was really very little risk in this case, one wonders why it lasted so long. Burlington Northern does not challenge the reasonableness of the time lead counsel invested, yet it is unreasonable to sink great gobs of time into a sure winner, as it is unreasonable for defense counsel to string the litigation out. Thus the actions of counsel in this case suggest that the risk persisted through much of its duration.

[5] The annual change in the value of equity investments was 15.8% over the four years 1979-82. Thus $100 invested on January 2, 1979, was worth $187.89 on the last trading day of 1982. (These

(Footnote continued on following page)

This substantial gap suggests that lead counsel understate the effect of delay by billing at current rates. Suppose, for example, that one of the lead counsel spent one hour on this case in 1980 at a time when his hourly rate was $110. In 1984 he seeks compensation for this 1980 work at a rate of $150. The increased rate does not cover the increase in the value of money. If he had had the $110 to invest in 1980, the money would have been worth $192.39 four years later (if the rate of appreciation were 15% per year). If the lawyer had chosen the safe strategy of buying municipal bonds (avoiding taxes to boot), he would have realized approximately 10% per year, for a value of $161.05 after four years. Thus we treat delay in payment as part of the justification for a multiplier in this litigation, even though counsel have not expressly sought a multiplier to compensate them for the time value of money.

III

This was risky litigation. Risk calls for a multiplier, substantial risk for a substantial multiplier. We do not attempt to quantify the risk in this litigation, but it seems substantial. Much of the risk is intrinsic to Title VII litigation. We review some of the sources of that risk and show why they pertain to this case.

Filing an employment discrimination case is a speculative endeavor. The plaintiffs' lawyers may respond to the

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[5] *continued*
data come from the tape maintained by the Center for research in Securities Prices of the University of Chicago. The tape includes all stocks traded on the New York and American Stock Exchanges. The return data given here assume investment in a "value weighted" portfolio and reinvesting all dividends.) The return available from investing in Treasury Bills, an almost perfectly safe strategy, was 11.6% compounded annually over the same period. U.S. Dep't of Commerce Bureau of Economic Analysis, *Business Statistics 1982* 63 (23d ed. 1983). The return on investments in shorter periods has been even higher. Between August 12, 1982, and August 9, 1983, the Dow Jones Industrial Index rose 50.4%, from 776.92 to 1,168.27.

complaints of victims of discrimination, but isolated complaints do not make a case. In antitrust and securities litigation—usually seen as risky and as supporting high multipliers—the initial plaintiffs may be able to report to counsel all of the telltale signs. Securities plaintiffs may observe the lie or the material omission after the truth comes out. Antitrust plaintiffs may observe the entire industry suddenly increase its prices, or they may observe parallel pricing or selling practices. Most of the clues of the violation are there; it remains only to complete the case. Nothing is so simple in Title VII litigation. The class members are not sophisticated businesses but isolated victims; the class representatives report only what happened to them, not the general pattern of the defendant's conduct. Thus while the antitrust lawyer starts with a pattern and proceeds to show a violation, and the securities lawyer starts with a known falsehood or omission, the civil rights lawyer must start by finding a pattern. And this may be very hard to do.

The victim-plaintiffs may have personal grievances that do not establish discriminatory treatment. It is hard to show even the individual violations. (Here, for example, the discharged class members, many of whom misbehaved, may have been fired because of race, yet perhaps white employees in the same position also would have been fired. It is hard to know whether race played a role even at the individual level.) It is necessary to build up the pattern case by case, department by department. Burlington Northern emphasizes that its managers were substantially autonomous; thus there may have been no pattern at all, but merely an isolated set of incidents. A complex investigation might have come to naught, foundering on the different practices within the Burlington Northern corporate structure.

The task is formidable. Often plaintiffs' lawyers who start with widespread complaints by employees will be unable to make a case. Sometimes the complaints will prove unfounded; sometimes genuine grievances will be unrelated to race or sex; sometimes there will be discrimination but

it will be localized; sometimes there will be real, systemic discrimination, but the proof will be hard to assemble and the evidence disputed. Even real patterns sometimes are hard to complete in litigation; it helps to have all the pieces of the jigsaw puzzle in view before starting to put them together. It is no accident, for example, that no class of racially-discharged employees has ever been certified and prevailed in trial. There are too many hurdles to establishing the pattern or practice of discrimination. Viewed ex ante, then, the risk was great. Yet a class of discharged employees ultimately won relief in this case.

Even when there is a pattern of discrimination waiting to be found, the costs and risks are substantial, and the costs must be sunk before there can be any assurance that they can be recouped. The construction of a prima facie case of a pattern or practice of discrimination under Title VII is likely to require (a) a thorough search of the defendant's applicant and employment files; (b) the creation of a computer data base with particulars of each employee's history and some details about the potential work force; (c) the hiring of statistical experts to assess the data and perform sophisticated tests. This must happen before there is any chance of success; it happened in this case, and the research efforts cost nearly $1 million in expenses alone, not counting the time of counsel. In many other cases plaintiffs have lost notwithstanding the accumulation of statistical information similar to that here. The investment is great; the risk great.

Sometimes even the earliest inquiries may find some dirty linen in the defendant's drawers. This will not be enough. The defendant will try to fob it off as isolated, as pertaining to but a single plant or line of progression. To find a piece of evidence that will establish discrimination throughout the workforce is serendipity, and even then the defendant would argue that the statistics show that the malevolent intent had no effect.

Once more, this case follows that pattern. Burlington Northern has attempted throughout to establish that any

evidence of discrimination should be treated as isolated, that each plant or line of progression must be analyzed on its own. That defense multiplies the costs and the risks plaintiffs face. Important non-statistical evidence in this case was obtained only after this Court's order of December 10, 1982, required Burlington Northern to release its "self-critical analysis," which contained damning evidence of system-wide discrimination. When this litigation began in 1978, the plaintiffs did not know that Burlington Northern would assemble such evidence, and they certainly had no assurance of receiving it. (Burlington Northern litigated to keep the evidence from plaintiffs' hands, and it took a decision of the Eighth Circuit to override the claim of privilege.)

Even when there is pattern-or-practice evidence and solid proof of intentional discrimination against particular members of the class, it is hard to obtain and keep a class certification—and without a certification, it will be impossible to recover the fees for all of the work done in the case. Thus the certification issue is fraught with risk. While this case was pending the Supreme Court abolished the across-the-board rule of class certification, the original basis of certification here. See *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). Burlington Northern moved for decertification; lead counsel successfully resisted. Other plaintiffs in other cases were not so fortunate. See *Vuvanich v. Republic National Bank of Dallas*, 723 F.2d 1195, opinions on denial of rehearing, 736 F.2d 160 (5th Cir. 1984) (decertification of class after eleven years of proceedings and victory for the class at trial).

Reading Burlington's papers in opposition to the application for fees, one might think that this case was a sure winner for the class all along. That is not what Burlington was saying earlier, when it moved to decertify in January 1983. After lead counsel had invested substantially all of the effort in assembling the evidence, Burlington Northern maintained that its divisional structure and decentralized employment decision-making was fatal to the class. It asserted that recently-changed Supreme Court

standards "no longer leave any room for doubt [about the impropriety of the class certification] when the facts are clear as they are in this case" (Br. 24). It turned out that what Burlington Northern said there was wrong. Lead counsel defeated the motion to decertify—as Burlington Northern now says they were bound to do.

This episode illustrates Burlington Northern's completely *ex post* perspective on this litigation. Whatever happened was bound to happen. The plaintiffs obtained substantial relief; thus they were bound to win, and there was little or no risk. The plaintiffs kept the hard-won class certification despite intervening changes in the law; thus they were bound to keep the certification and faced little risk. For reasons we have emphasized, though, this is not the appropriate perspective. We must assess risk *ex ante*, when the lead counsel were deciding whether to sink time into this case or into some other endeavor that would bring more immediate rewards. We know *now* that they prevailed, but this does not negate risk. There was a chance that all leads would come to naught; there was a chance that no pattern would emerge; there was a substantial chance, right through early 1983, that the class would be decertified. It is the accumulation of these chances, each substantial in its own right, that makes Title VII cases of this sort risky indeed.[6]

The developments on the class decertification motion illustrate still another kind of risk—uncertainty in the law.

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[6] Burlington Northern's Preliminary Response to the request for fees (at 6) accuses lead counsel of inconsistency in saying back in 1983 that the *class* was proper and saying today that there was risk of decertification. We do not see the inconsistency; this is yet another illustration of the problem that arises from an *ex post* view of litigation. The case may have been quite risky even though plaintiffs prevailed, and lead counsel are entitled both to resist the motion to decertify as unwarranted and to emphasize the risk that they would fail. Ultimately, though, the question is not whether lead counsel are contradicting themselves or whether, instead, Burlington Northern is guilty of self-contradiction. The question is: What was the risk anticipated when the case began or counsel decided to commit blocks of time?

Again antitrust provides a useful contrast. It has been clear since 1927, when the Supreme Court decided *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), that all horizontal price fixing is unlawful. The twists and turns of antitrust doctrine have not affected this bedrock principle, which supplies the basis of almost all private class action antitrust litigation. Title VII, though, is a young statute, and as a young statute gives rise to rapid evolution. This case, filed in 1978, has spanned a third of Title VII's 20-year existence. During these years Title VII law has changed repeatedly. Burlington Northern seized on one of these changes (the abolution of the across-the-board rule) to seek decertification and thus defeat for the class. There have been others. For example, *United States Postal Service Board of Governors v. Aikens*, 103 S. Ct. 1478 (1983); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), held that the prima facie case in Title VII litigation is a bursting bubble; once the defendant puts on some evidence, the presumption vanishes, and the plaintiff must once again shoulder the full burden. This set aside a line of cases that had placed a greater burden on the defendants. The risk of a change in law that would undercut this suit was ever-present, and it almost came to pass.

The effects of the risk in Title VII litigation are magnified by the nature of the stakes. Most Title VII cases have a single defendant, and most end with a small cash payment together with injunctive relief. This resolution makes it hard for plaintiffs' counsel to recover fees. In antitrust and securities cases the settlement or judgment very often will be for cash. The value of the settlement is known, and counsel may be paid from the fund. Payments often are unopposed. Moreover, because there are usually multiple defendants, it is common for some to settle early. The early settlements create a fund that alleviates the risk of complete nonpayment. None of this occurs in Title VII litigation. There are no early settlers, because there will be but one defendant. The cash fund is usually small and reserved for the benefit of the class;

counsel must look to the defendant for payment; the defendant is sure to opose the request. And if counsel rely on the implicit value of the injunctive relief, as lead counsel do here, the defendant is sure to intone that the injunction it sought to avoid is really just an order to do what it was doing anyway and is of little or no marginal value to the class.

We conclude, for all of these reasons, that the risk of failure is substantial. Just as bad from counsel's point of view, the risk of victories too small to justify full compensation for time invested also is substantial. Following the logic of Part II, this means that plaintiffs are entitled to a substantial multiplier. A small multiplier or no multiplier at all sends to the plaintiffs' bar the message: get out of Title VII work and take paying clients instead. That is not the message Congress had in mind. In antitrust and securities law, multipliers from two to four are common.[7] As we have illustrated, Title VII is in general riskier. Consequently the multiplier requested by lead counsel does not appear to be out of line.

We have one final thought. The illustrations in Part II were based on the assumption that a lawyer did not care whether he received $100 with certainty or instead received a 50% chance of obtaining $200. In economic jargon, we assumed that laywers are risk neutral. But plainly they are not. They must be compensated to subject themselves to risk. The larger the stakes, the more compensation is appropriate.

Most people who buy lottery tickets, risking a few dollars, would not risk a week's wages on the same terms. Investors who are willing to take the risk that 100 shares of IBM common will rise or fall in price next week are unwilling to invest their life's savings in IBM, although the chances of gain or loss are identical no matter how much they invest. A judge who might put a $5 wager on his skill across the chessboard would not stake a year's

[7] See H. Newberg, *Newberg on Class Actions* §7025 (Supp.) (collecting multipliers).

salary at the same odds. When the risk is undiversified (the life's savings on one stock, the year's salary on one game), the odds must change to compensate for the extra risk.

Often lawyers who work in risky cases can hedge their bets. The members of the plaintiffs' bars in antitrust and securities have found it possible to "syndicate" their cases. Each lawyer works on many cases at once; each case is staffed by teams of lawyers. This spreads risk. But the lawyers who work in the civil rights bar have not found the syndication of risk possible. For many reasons—and we are not sure we fully appreciate them, but they must include difficulties of conflicts of interest—the civil rights bar is organized into very small firms. The firms of lead counsel in this case are tiny compared with the 200-lawyer firms representing defendant. Worse for the risk problem, each lead counsel has sunk the bulk of his professional life for several years into this case. His fortune stands or falls on this application for fees. That is not a comfortable position. Nonetheless it seems to be a necessary one in civil rights litigation. When risk is not spread across many cases—when, as here, a litigator must put all his eggs in one basket—the need to multiply the gains in order to offset the losses is at its greatest. Thus we have no doubt about the propriety of a substantial multiplier in this case.

The foregoing affidavit states our analysis and belief on the basis of the information to which we have referred, including documents filed in this case and general principles of economics.

/s/ FRANK H. EASTERBROOK

/s/ ROBERT A. SHERWIN

Subscribed and sworn this twenty-third day of August, 1984.

/s/ CAROLYN JENNINGS

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PAPERS AND ARTICLES

The Extent of the Market (with George J. Stigler) (Center for the Study of the Economy and the State, Univ. of Chicago, Working Paper No. 31, December, 1983).

Research Assistant for the following articles:

Kenneth Dam, *The American Fiscal Constitution*, 44 U. Chi. L. Rev. 271 (1977).

William Landes & Richard Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J.L. Stud. 83 (1978).

William Landes, *An Economic Study of U.S. Aircraft Hijacking 1961-1976*, 21 J. Law & Econ. 1 (1978).

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Previous positions

Deputy Solicitor General of the United States (January 1978 to June 1979). Supervision of federal Supreme Court litigation concerning antitrust, securities, and general civil matters.

Assistant to the Solicitor General (September 1974 to December 1977).

Law Clerk to the Honorable Levin H. Campbell, Circuit Judge, United States Court of Appeals for the First Circuit (July 1973 to August 1974).

Education

J.D. 1973, cum laude, University of Chicago Law School. Topics and Comment Editor, University of Chicago Law Review.

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Professional activities and affiliations

Editor, Journal of Law and Economics (1982-)
Member, SEC Advisory Committee on Tender Offers (1983)

District of Columbia Bar; American Law Institute; American Bar Association; American Economic Association; Association of American Law Schools (Member, Executive Committee, Antitrust Section, 1982-85)

Courses taught

Antitrust Law	Regulated Industries
Corporate Law	Securities Regulation
Criminal Procedure	The Supreme Court

Books

Antitrust: Cases, Economic Notes and Other Materials (2d ed. 1981; Supplement 1982-83; Supplement 1984-85 in press) (with Richard A. Posner)

The Economic Structure of Corporate Law (in preparation) (with Daniel R. Fischel)

Scholarly acticles

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Teaching Law, Swarthmore College Bulletin 6 (Nov. 1980)

Supreme Court litigation

I played a principal or substantial role in the preparation of the Supreme Court briefs in the following cases, among approximately 100 others. I presented the oral argument in 20 of these cases. All briefs through 1980 were on behalf of the United States.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (the purchaser-seller rule in securities litigation

Buckley v. Valeo, 424 U.S. 1 (1976) (constitutionality of the Federal Election Campaign Act)

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Gregg v. Georgia, 428 U.S. 153 (1976) (constitutionality of death penalty)

NLRB v. Enterprise Association of Steamfitters, 429 U.S. 507 (1977) (secondary boycotts)

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (antitrust suits by indirect purchasers)

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorneys' advertising under the antitrust laws and the First Amendment)

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) (school desegregation)

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (constitutionality of statute preserving President Nixon's tapes and papers)

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (municipalities as antitrust defendants)

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) (regulatory authority over oil pipelines)

National Broiler Marketing Association v. United States, 436 U.S. 816 (1978) (agricultural exemption from the antitrust laws)

United States v. Scott, 437 U.S. 82 (1978) (Double Jeopardy Clause)

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) (countervailing duties statute)

Regents of University of California v. Bakke, 438 U.S. 265 (1978) (use of race in student admissions)

United States v. United States Gypsum Co., 438 U.S. 422 (1978) (price information exchanges under the antitrust laws)

A&P v. FTC, 440 U.S. 69 (1979) (buyer liability under the Robinson-Patman Act)

Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979) (insurance exemption from the antitrust laws)

Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (know-how disclosures under the antitrust laws)

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) (antitrust status of ASCAP and application of per se rules)

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (constitutionality of veterans' preferences)

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (consumers as antitrust plaintiffs)

Leroy v. Great Western United Corp., 443 U.S. 137 (1979) (constitutionality of state tender offer statutes)

McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) (interstate commerce requirement under the antitrust laws)

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) (Freedom of Information Act)

United State Parole Commission v. Geraghty, 445 U.S. 388 (1980) (mootness doctrine)

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) (cost-benefit analysis under OSHA)

Rice v. Norman Williams Co., 458 U.S. 654 (1982) (antitrust preemption)

Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984) (tie-in contracts)

National Collegiate Athletic Association v. University of Oklahoma, 104 S. Ct. 2948 (1984) (antitrust analysis of network television contracts for college football)

Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) (tax exemption for domestic liquor under Commerce Clause and 21st Amendment)

Honors and Prizes

Elected to Phi Beta Kappa and Order of the Coif

Jerome N. Frank Prize, 1973, for best student writing in the University of Chicago Law Review

Department of Justice Special Commendation for Outstanding Service, 1979

Prize for Distinguished Scholarship in Law and Economics, 1981, awarded by the Law and Economics Center of Emory University (for work with Daniel R. Fischel on tender offers)

Named one of the Ten Outstanding Young Citizens of Chicago by the Chicago Jaycees, 1981

Mont Pelerin Society Fellow, 1982

Elected to American Law Institute, 1983

APPENDIX E

[May 15, 1986]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 374 — No. 78 C 269

The Equal Employment Opportunity Commission, Gregory Jones, Owen T. Sloan and Robert Jeffrey, Jr.,

Plaintiff-Intervenors,

and

William E. McBride, William H. Butler, Lenno Edwards, Albert White, Brunice McNeal, Ruben McGaughy, William Forbush, Tyrone Coffee, Hilary R. Jones, Dubois Gilliam, and Michael Love, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Burlington Northern Inc.; Brotherhood of Locomotive Engineers; United Transportation Union, AFL-CIO; Railroad Yardmasters of America, AFL-CIO; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO; Brotherhood of Maintenance of Way Employees, AFL-CIO; American Train Dispatchers Association, AFL-CIO; International Association of Machinists & Aerospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths,

(Caption continued on following page)

Forgers & Helpers, AFL-CIO; Sheet Metal Workers' International Association, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Brotherhood of Railway Carmen of U.S. and Canada, AFL-CIO; International Brotherhood of Firemen & Oilers, AFL-CIO; Brotherhood of Railroad Signalmen, AFL-CIO,

Defendants.

Before the Honorable George N. Leighton
U.S. Senior District Judge

Memorandum

This is an application by two law firms, Davis, Miner, Barnhill & Galland ("Barnhill") and Freeman, Freeman & Salzman ("Freeman"), for awards of attorney fees and expenses. Barnhill seeks attorney fees and expenses for administration of the consent decree and for litigating a fee petition which this court granted. *See. E.E.O.C. v. Burlington Northern Inc.*, 618 F. Supp. 1046 (N.D. Ill. 1985).[1] Freeman seeks fees and expenses only with regard to litigation of the fee petition. The parties agree that applicants are entitled to fees and expenses, the dispute concerns the amounts which should be awarded. *See Bond*

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[1] Burlington does not question counsels' standing to file this application. In view of this, the court does not either, although it is aware that lawyers "have no standing whatsoever to file an application for a direct award of attorneys' fees under section 2000e-5(k) [of Title VII]". *Rainsbarger v. Columbia Glass & Window Co.*, 600 F. Supp. 299, 301 (W.D. Mo. 1984). This court, as did the one in *Rainsbarger*, will construe the petition as having been filed by named plaintiffs, or for them with their knowledge and permission, it being conceded that they are prevailing parties.

v. Stanton, 630 F.2d 1231, 1235 (7th Cir. 1980); *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984).[2]

Burlington argues that resolution of this matter should await the outcome of the appeal from the fees petition litigation. The court finds this argument unpersuasive. Deferral of this ruling would preclude any possibility of consolidation of these issues on appeal; a sufficient reason not to delay. Burlington also takes the position that 10% of any award should be allocated to the defendant unions. However, the unions took no active part in either of the matters for which applicants now seek their award, namely the fees petition and administration of the consent decree. Accordingly, no part of the award on this application will be allocated to the defendant unions.

I. *Administration of the Consent Decree*

Only Barnhill asks for fees and expenses relating to the administration of the consent decree. The firm seeks $86,766.50 in fees[3] and $105,048.30 in expenses.[4] Burlington Northern ("Burlington") has no objection to these amounts. Accordingly, with regard to the administration of the consent decree, Barnhill is awarded $86,766.50 in fees and $105,048.30 in expenses.[5]

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[2] In this case, the fee award was made pursuant to § 2000e-5(k) of Title VII. However, it, like 42 U.S.C. § 1983, employs the "prevailing party" concept. Both statutes therefore receive similar construction. *Doe v. Busbee*, 684 F.2d 1375, 1380 n.3 (11th Cir. 1982).

[3] Burlington arrived at this figure by subtracting the amount of fees sought in connection with the fees petition, $94,720.00, from the total amount of fees requested, $181,486.50. Barnhill does not dispute this calculation.

[4] Barnhill did not segregate expenses into categories relating to the fee petition and those relating to consent decree administration. Burlington approximates administration expenses to be $105,048.30.

[5] On April 25, 1986, an agreed order was entered ordering Burlington to pay the $86,766.50 representing the fee award and $104,435.18 representing the expenses incurred. The remaining

(Footnote continued on following page)

II. *The Fee Petition*

Freeman and Barnhill both seek fees and expenses in connection with the fee petition of plaintiffs and the class on which this court awarded lead counsel $2,184,165.50. In so doing, it held that lead counsel were entitled to their entire lodestar fee rates, *Burlington Northern Inc.*, 618 F. Supp. at 1055, but that they were not entitled to any multiplier on the lodestar figure. Lead counsel had sought an enhancement of 2.5. *Id.* at 1064. Barnhill now asks for $94,720.00 in fees and $46,364.51 in expenses; Freeman, $122,676.50 in fees and $7,900.90 in expenses.

It is well established that plaintiffs, as prevailing parties, are entitled to an award of "reasonable" fees and expenses for time spent presenting, substantiating and litigating their fee petition. *Bond*, 630 F.2d at 1231; *Henry*, 738 F.2d at 192. The question thus becomes what is reasonable.

According to the traditional view, when making this decision, the district court should first determine the lodestar fee, that is, the product of reasonable hours times a reasonable rate. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983). From there, depending on other things, such as the results obtained, the court may make an upward or downward adjustment of the fee award. *Id.* at 434-36.[6] However, in *Kirchoff v. Flynn, et al.*, No. 85-2187, slip op. (7th Cir. Mar. 17, 1986), the court of appeals for this circuit recognized, for the first time, that in cases where the private market employs a contingent fee method of

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[5] *continued*
$613.12 in expenses represents a portion of a charge by Analytics Inc., which the parties originally disputed. However, while this petition has been pending, they have settled their dispute and Burlington has agreed to pay the Analytics bill. Therefore, with regard to the administration of the consent decree, the only amount yet to be paid by Burlington is this $613.12.

[6] The parties disagree on whether the second step of the analysis should be applied to a petition seeking an award for time spent litigating a claim for fees. *See infra* at pp. [E-7-8].

computing attorney compensation, so may the district court when making a fee award to a prevailing party. *Id.* at 13.

The court began with the premise that a fee award to a prevailing party should mirror the fee the party would have received in the private market. *Kirchoff*, slip op. at 6. From this, it concluded that because the private market consistently employs contingent fee arrangements in certain types of cases, the district court could, in those same cases, likewise "employ a contingent fee as a benchmark" when awarding fees to a prevailing party. *Id.* at 13.

Plaintiffs, relying on *Kirchoff*, argue that this litigation involves merely a complex trial to collect fees admittedly owed them by Burlington; and as such, it should be analogized to a civil collection case in which the private market compensates attorneys on a contingent fee basis. In this regard, they request the court to take judicial notice that the market fee rate for such cases ranges between 33⅓ and 40% of the amount recovered. This argument must be rejected.

Rule 201 of the Federal Rules of Evidence provides that a judicially noticed fact is one which is not subject to "reasonable dispute" because it is either "generally known . . . or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Civ.Evid. 201(b). There is nothing in the record of this case to support the conclusion that it is generally known and is not subject to reasonable dispute that the market fee rates in cases such as this are between 33⅓ and 40% of the amount recovered. It is therefore the court's opinion that because the "high degree of indisputability" required to take judicial notice of a fact is lacking, it would be improper to take judicial notice of plaintiffs' suggested fee rates. *See* Fed.R.Evid. 201 advisory committee note (a).

A second, and perhaps more compelling reason for rejecting plaintiffs' analysis is that applying their suggested rates to the facts of this case results in paying plaintiffs'

counsel as much as $648.00 per hour.[7] Such a result is clearly untenable. The ultimate duty of the court when awarding prevailing party attorney fees is to structure an award that is reasonable. *Hensley*, 103 S. Ct. at 1939; *Kirchoff*, slip op. at 6. Reasonableness is the backdrop upon which all prevailing party fee awards are based. It is perhaps with this in mind that the *Kirchoff* court stated its holding in permissive, rather than mandatory terms; the district court "may" use or is "entitled to employ" a contingent fee standard. *Kirchoff*, slip op. at 13. The court therefore must have recognized that use of contingent fee formulas could sometimes yield unreasonable results; such is the case here.

Therefore, this court concludes that the traditional method of fee calculation should be employed when determining fees in this case. As noted, the first step in this process is determining the lodestar amount: the product of a reasonable rate times the number of reasonable hours spent. *Hensley*, 103 S. Ct. at 1939.

The parties agree on the amount of the lodestar: for Barnhill, $94,720.00; for Freeman, $122,676.50. They also agree on the amount of expenses incurred: for Barnhill, $46,346.51; for Freeman, $7,900.90. It is at the second step of the process that they are in disagreement. At this step, the court must determine whether an upward or downward adjustment in the award is warranted due to, among other things, the results obtained. *Hensley*, 103 S. Ct. at 1940. In this regard, Burlington takes the position that the amounts requested should be substantially reduced. It argues that because of the limited success on the fee petition, the award for fees and expenses in litigating it should be decreased accordingly. Applicants, on the other hand, take the position that the second step of the *Hensley*

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[7] Barnhill and Freeman claim approximately 1,348 attorney and paralegal hours. They suggest that applying *Kirchoff* entitles them to an award of as much as $875,600.00. That sum divided by 1,348 hours equals $648.07 per hour.

analysis does not apply to an application seeking an award for time spent litigating a fee claim. They argue that the court should inquire only into the reasonableness of the application without regard to the success or failure in litigating the merits of the original fee petition.[8]

In *Hensley*, the Supreme Court held that when determining the amount of a fee award, a crucial factor to consider is the extent of success on the merits. *Id.* at 1940-41. The Court reasoned that since Congress authorized that only reasonable fees be awarded, a reduction is warranted where a petitioning party achieves "only partial or limited success." *Id.* at 1941.

This court is of the opinion that the reasoning of *Hensley* is equally applicable to a petition seeking an award for time spent litigating a claim for fees. Any other result would be illogical; to allow a fee petition, which considers the degree of success on the merits, and then reimburse the petitioning party without regard to the extent of success on that original petition for fees, is contrary to the spirit of the Fees Act. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 958 (1st Cir. 1984). In this regard, "inability to apply *Hensley* would deprive the district court of the means to deal with unmeritorious counsel fee claims." *Institutionalized Juveniles v. Sec. of Public Welfare*, 758 F.2d 897, 924 n.42 (3d Cir. 1985).

When determining whether a reduction in an award is warranted under *Hensley*, the court must apply a three-prong analysis. First, it should assess the results obtained. Second, the court should measure the extent of the moving party's success by comparing the results obtained with the relief sought. Third, the court must structure an award that is reasonable. *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 568-69 (7th Cir. 1983). With regard to the final prong, an award should be re-

[8] Applicants argue that if *Hensley* were to apply in this case, it would entitle them to an enhanced, rather than decreased award.

duced if the relief obtained is limited in comparison to the litigation as a whole. *Id.* at 569.

When applying this analysis to the case at bar, the court first notes that in the fee petition litigation, applicants were awarded $2,184,165.50. *Burlington Northern Inc.*, 618 F. Supp. at 1055. This figure appears to represent significant success. However, application of the second prong reveals that applicants sought a multiplier of 2.5, so that actually they were seeking an award of $5,150,942.70.[9]

Finally, with regard to the third prong, it is apparent that the relief obtained was significantly limited when compared to the fee petition litigation as a whole. That litigation contained two major issues: the lodestar rates and the multiplier. On the first of these, applicants succeeded, that is, the court held that they were entitled to the lodestar rates which they sought. *Burlington Northern Inc.*, 618 F. Supp. at 1055. However, with regard to the multiplier issue, the court concluded that plaintiffs had not carried their burden of proof and "therefore a multiplier of any amount would be improper." *Id.* at 1064. Plaintiffs therefore did not succeed on an issue which would have increased the award by almost $3,000,000.00. Such a result represents limited success and warrants a reduction in the award they seek for the time and expense devoted to obtaining the order for attorney fees.[10]

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[9] The award of $2,184,165.50 multiplied by a factor of 2.5 actually yields a figure of $5,460,413.70, however, applicants did not seek a multiplier on all of the lodestar amount thus the total fee request is a slightly lower figure. *Burlington Northern Inc.*, 618 F. Supp. at 1053. The parties calculate the total fee request to be a figure somewhat lower than the court's figure of $5,150,942.70. *Id.* at 1053.

[10] The court notes that even if it were to use the reasonableness standard which applicants argue should be applied, the same result would be reached. This is so because they were unreasonable in seeking a multiplier in this case. They were awarded the highest hourly rate they had ever charged, Burlington had already conceded that fees were warranted and they were reimbursed for all of their litigation expenses. Seeking a greater award by way of a multiplier, in the court's opinion, was simply unreasonable.

Hensley recognized two methods of reducing fees. The first involves eliminating hours spent on unsuccessful claims; the second, and more general, simply requires reducing the award "to account for the limited success." *Hensley*, 103 S. Ct. at 1941. This court has discretion in determining which of these methods should be applied. *Id.* at 1941.

Where applicants' claims are not separate but rather arise out of a common issue, it is difficult, if not impossible to attribute certain hours and expenses to specific issues. *Id.* at 435. This is particularly true where, as in this case, applicants have made no attempt to segregate the amounts spent on specific issues. In these situations it is therefore best to focus on the overall relief obtained rather than attempt to eliminate hours and expenses spent on specific issues. Accordingly, the second method of fee reduction recognized in *Hensley*, should be applied, that is, "reducing the award to account for the limited success."[11]

As noted, the original fee petition sought an award of $5,150,942.70. The actual award was $2,184,165.50; approximately 42% of the amount sought. A strictly mathematical approach would therefore call for a reduction of about 58%. However, adherence to strict mathematical calculations is improper when determining the amount of a reasonable award. *Hensley*, 103 S. Ct. at 1940-41. The court must instead consider the totality of the circumstances surrounding the fee petition litigation and structure an award that is reasonable.

After again reviewing the record of these proceedings, the court, in its discretion, finds that applicants' award should be reduced by 35% in order to reflect their limited

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[11] Burlington attempted to separate "rates" expenses from "multiplier" expenses rather than apply a percentage reduction to the expenses incurred. The parties disagree on the issue of what expenses relate to what issue. Because of the speculation involved in separating expenses, the court is of the opinion that as with attorney fees, a percentage reduction should be made.

success on the fee petition. While it is impossible to achieve exactness on an issue such as this, *Hensley*, 103 S. Ct. at 1941, the court is of the opinion that a 35% reduction yields a fair and equitable result. This conclusion is supported by an examination of the amount of evidence submitted by lead counsel on the multiplier issue in the fee petition litigation. The parties extensively briefed the fee petition litigation; lead counsel alone filed eight legal memoranda and supplemental memoranda. A review of those filings reveals that over 70% of the legal analysis was devoted to the multiplier issue. In addition, lead counsel submitted a deluge of affidavits and deposition testimony on the issue. *See* Hoyt Aff.; Easterbrook and Sherwin Joint Aff.; Hill Aff.; Easterbrook Dep.; Shavell Dep.; Warner Dep. They also presented significant amounts of evidence on the multiplier issue at the fees hearing; this evidence related to the risk of the underlying litigation, the necessity of fee enhancements in Title VII cases, the exceptional relief secured for plaintiffs, and the time delay between work completed and date of payment. *See* Transcript of Fees Hearing, November 26-28, 1984. From this, it is obvious that lead counsel spent a great deal of time and energy presenting the multiplier issue to the court; an issue on which they did not succeed.

The court does not mean to imply that this process of weighing amounts of evidence and argument submitted is a conclusive factor when determining the proper award reduction. It is done only to illustrate the reasonableness of the 35% reduction in the award for fees and expenses. Accordingly, in connection with the fee petition, the Barnhill firm is awarded $61,568.00 in fees and $30,136.93 in expenses.[12] The Freeman firm is awarded $79,739.73 in

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[12] As with the award in connection with consent decree administration, an agreed order was signed ordering Burlington to pay the amounts which they did not dispute, that is $56,832.00 in fees and $3,769.83 in expenses. Therefore, with regard to the fee petition, the amounts yet to be paid by Burlington are $4,736.00 in fees and $26,367.10 in expenses.

fees and $7,900.90 in expenses.[13] An appropriate order will be entered.

So ordered,

/s/ GEORGE N. LEIGHTON
United States Senior District Judge

Dated: MAY 15 1986

[13] The expenses incurred by Freeman have not been reduced because Burlington does not contest them. Further, pursuant to the agreed order, Burlington has already paid $73,605.90 in fees and $7,900.90 in expenses. Therefore, the only amount yet to be paid is the remaining $6,133.83 in fees.

Supreme Court, U.S.
FILED
JUL 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

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No. 86-1880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SPRENGER, OLSON & SHUTES P.A., and
DAVIS, MINER, BARNHILL & GALLAND,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: July 21, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the court of appeals err in affirming the district court's conclusion that petitioners failed to prove this was one of those "selected" cases in which an addition to the $2.18 million lodestar fees award was warranted?

2. Did the court of appeals err in affirming the district court's conclusion that petitioners had not met their burden of showing that the risk of contingency justified an enhanced fees award?

3. Did the lower courts err in not accepting petitioners' argument that risk enhancement is required for fees awards in *all* successful contingent representations?

4. Did the court of appeals err in affirming the district court's finding that the settlement in this case did not constitute "exceptional" relief and thus did not justify fees enhancement?

LIST OF CORPORATE AFFILIATES AND SUBSIDIARIES

Burlington Northern Railroad Company:

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Galveston Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railroad Company
- Paducah & Illinois Railway Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- The Wichita Union Terminal Railway Company
- Winona Bridge Railway Company

The El Paso Company:

- El Paso Natural Gas Company:
  - El Paso Development Company:
    - Lake Country Windjammer, Inc.:
      - Adams Canyon Ranch
      - Santa Paula Farms
  - El Paso Hydrocarbons Company:
    - Minera San Pedro Corralitos, S.A.

Meridian Petroleum Holding, Inc:

Meridian Oil, Inc. (formerly Milestone Petroleum, Inc.):

Butte Pipe Line Company
Portal Pipe Line Company

New Mexico and Arizona Land Company:

NZ Development Corp.
NZ Properties, Inc.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Burlington Northern Railroad Company ("BN") asks this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit.

COUNTERSTATEMENT

The decision below upholds the district court's award of $2.18 million in attorneys fees to petitioners for their work on a Title VII class action. That award represented petitioners' "lodestar" fees, the district court having found after a three-day hearing that the evidence did not show that "exceptional" success had been achieved, and did not demonstrate that the risk of the representation justified fees enhancement.

The Seventh Circuit's opinion chiefly reviews the district court's assessment of the evidence on risk and relief. Petitioners, however, provide an unbalanced description of that evidence and of what the lower courts did. A counterstatement follows.

A. The Merits Litigation

The merits litigation in this case began in January 1978 with the filing of *McBride et al. v. BN* (N.D. Ill.). It settled in November 1983. *In re Burlington Northern, Inc. Employment Practices Litigation*,[1] 810 F.2d 601, 603 (7th Cir. 1986), *reprinted in* Pet. App. A1, A2. Petitioners, along with lawyers from the EEOC, were lead counsel for a class of black plaintiffs who charged that BN and its labor unions had violated Title VII. *EEOC v. Burlington Northern, Inc.*, 618 F. Supp. 1046, 1049 (N.D. Ill. 1985), *reprinted in* Pet. App. C1, C6.

In late 1978, the *McBride* plaintiffs moved for class certification; at about the same time, the EEOC moved to intervene as a plaintiff. Within months, the district court certified a broad "across-the-board" class and permitted the Commission to intervene. 618 F. Supp. at 1049, 1058; Pet. App. at C5-6; C23.

By early 1979, BN's employment practices had become a popular target. Eleven different lawyers or firms, representing fourteen different black plaintiffs, ultimately filed private Title VII suits against the company. This forced BN to seek multi-district consolidation, which was granted in April 1979. Various pending suits were consolidated with *McBride* in the Northern District of Illinois. 618 F. Supp. at 1050, 1062; Pet. App. at C5-6; C30.

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[1] The petition for writ of certiorari will be cited as "Pet. ——." The petitioners' appendix will be cited as "Pet. App. ——." Plaintiffs' fees hearing exhibits are cited as "PX ——", defendant's as "DX ——." The transcript of the fees hearing is cited as "Tr. ——." Other items are cited with a title, date, and page number.

Along with petitioners, the EEOC played a significant role throughout the merits litigation. In fact, the Commission had been investigating BN's employment practices three and one half years before *McBride* was filed. 618 F. Supp. at 1048-49; Pet. App. at C4. Over the five year course of *McBride*, thirteen attorneys and nine legal assistants from the Commission participated,[2] and the Commission shouldered about $675,000 in expenses. 618 F. Supp. at 1051; Pet. App. at C10. It was the EEOC that referred William E. McBride and his colleagues as clients to Davis, Miner, Barnhill & Galland, one of the petitioners here. (Tr. 301)

Consistent with the case scope plaintiffs sought, discovery was extensive. Most of it was conducted by the plaintiffs. Petitioners have said that the results of this discovery were "spectacularly useful."[3] They have said they developed "overwhelming proof of plaintiffs' allegations," including 'damaging admissions," "admissions of intentional discrimination," "excellent results" in depositions, and company officials turning " 'states evidence' ".[4]

B. Merits Settlement

According to one of petitioners' experts, this was a "classic case . . . in which the parties both benefit from getting together and settling"; it offered, he said, "perfect questions for settlement." (Michaelson Dep. 52-56). Plaintiffs began the settlement process four years into the suit, when they made their first offer, demanding $60 million and wide-ranging injunctive relief. (Tr. 275-7) This led to extended negotiations beginning in August 1983. (Tr. 224-5) By October 1983, a week or so before

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[2] EEOC Response to BN's Interrogatories on Fees and Expenses, Question 3 (July 3, 1984).

[3] Memorandum in Support of Lead Counsels' Application for Fees and Costs at 10 (May 25, 1984).

[4] *Id.* at 10, 12, 15, 17; Tr. 265-69.

trial, the parties had agreed on a way to resolve a substantial portion of the case. (Tr. 226-7) In early November 1983, the day before trial was to begin, the parties agreed on a Consent Decree settling the entire case (Tr. 227-25).

The Decree, which received final approval in April 1984, settled all the cases consolidated in MDL 374. In return for a release of all class members' claims, BN agreed to pay $10 million—between $500 and $1,000 per class member.[5] The decree also contains formulas for what have proven to be relatively low hiring fill rates. It includes other injunctive relief which has changed BN's employment practices very little.[6]

C. The Fees Litigation

The Decree provided that BN would pay reasonable fees and costs for the litigation it resolved. Therefore, in May 1984, various counsel and the EEOC filed thirteen petitions for such awards. All were settled except petitioners'. 618 F. Supp. at 1051; Pet. App. at C10. Petitioners asked for $6.8 million in fees and $1 million in expenses. They sought a 3.5 multiplier and an effective average hourly rate for lawyers of over $540.[7] BN contended this fees claim was too high, because it was based on excessive lodestar hourly rates and an unjustified multiplier. The company did not, however, contest the hours or expenses claimed by petitioners.

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[5] Lead counsel estimated that there were between 10,000 and 20,000 class members. (Tr. 281-82). Actual distributions averaged about $1,500, since only about 7,000 to 8,000 class members who filed claims were eligible for money. Over half the class got nothing. 618 F. Supp. at 1058; Pet. App. at C23; Tr. 156-58; 281-82.

[6] DX-F; Tr. 388-89; Decree, 7-10; Implementing Agreement No. 2 (March 19, 1984).

[7] Memorandum in Support of Lead Counsels' Application for Fees and Costs at 43-46 (May 25, 1984).

After six months of discovery, the district court held a three day fees hearing in November 1984. BN and petitioners presented lay and expert witnesses and exhibits. Petitioners continued to pursue a very large award, though they did reduce the multiplier they sought from 3.5 to 2.5. 618 F. Supp. at 1053; Pet. App. at C12-13.

On September 20, 1985, the district court issued its opinion, awarding petitioners $2.18 million in fees. Despite saying that "there is some merit in Burlington's contention that the hourly rates sought by lead counsel are too high" (618 F. Supp. at 1054; Pet. App. at C16), the court awarded the rates sought, which mostly ranged between $160 and $180 per hour. They were, the court said, "the top hourly rate [petitioners] . . . have ever been paid by clients or awarded by a court . . .," and were "the top they can request." 618 F. Supp. at 1061; Pet. App. at C29.

The district court denied petitioners' request for a multiplier. After recounting the parties' positions on the relief achieved (618 F. Supp. at 1056-57; Pet. App. at C19-20) it concluded that, for a variety of reasons, the result embodied in the Decree was not so "exceptional" as to justify fees enhancement. 618 F. Supp. at 1058-60, 1064; Pet. App. at C20-28, C35.

The district court also concluded that "lead counsel have not met the required burden" to prove that the risk of contingency made this a case warranting an addition to lodestar fees. 618 F. Supp. at 1062; Pet. App. at C31. In doing this, the district court considered, but was not persuaded by, evidence that lawyers would abandon plaintiffs' Title VII practice if enhancement were not added to a fees award already made large by high hourly rates. 618 F. Supp. at 1061-62. Pet. App. at C29-31.

The court of appeals affirmed the district court's denial of a multiplier, holding that the trial judge had properly considered evidence bearing on both relief and risk. 810

F.2d at 604-05; Pet. App. at A5-6. On each point, the Seventh Circuit was unwilling to find an abuse of discretion in the district court's conclusion that the evidence did not warrant enhancement. 810 F.2d at 607, 608; Pet. App. at A10-11, A-12-13. Petitioners sought *en banc* rehearing, but their request was denied in February 1987. 810 F.2d at 611-12 *reprinted in* Pet. App. B1-3.

REASONS FOR DENYING THE WRIT

Petitioners' claim that this case involves important legal questions is based on an inaccurate account of the lower courts' decisions and on a misleadingly selective description of the evidence. In fact, by granting and affirming a $2.18 million fees award, the lower courts acted in a manner consistent with the views expressed by a majority of the members of this Court in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (U.S., June 26, 1987) (slip opinion) (*"Delaware Valley II"*), and with this Court's attorneys fees opinions before *Delaware Valley II*.

The district court received from both sides a mountain of evidence on the risks of contingent representation—in this case and generally—and on the results. It considered arguments covering all of the issues addressed in *Delaware Valley II*. Based on all this, the district court concluded, in light of the high hourly rates it awarded, that lodestar fees constituted a reasonable award without additional enhancement. The Seventh Circuit was unwilling to disturb the trial court's conclusions, finding them supported by evidence in the record. Petitioners have no substantial legal basis for their self-professed goal of "making a large fee larger."[8] Their factual disagreements with the lower courts do not warrant review by this Court.

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[8] Lead Counsels' Brief to the Seventh Circuit at 18 (January 21, 1986).

ARGUMENT

I. PETITIONERS MISCHARACTERIZE THE RECORD AND WHAT THE LOWER COURTS DID

Since there must be "special and important reasons" for this Court to grant a writ of certiorari,[9] petitioners work hard to characterize the decisions below as arbitrary, misguided, and wrong. In doing so, however, they describe decisions the lower courts never made.

A few examples of petitioners' inaccuracy will suffice. Petitioners suggest, for instance, that the court of appeals made district court rulings on risk enhancement "unreviewable" (Pet. Br. at i, 11); in fact, the Seventh Circuit *did* explicitly review the district court's conclusions on that point. 810 F.2d at 605, 608; Pet. App. at A6-7, 11-13. Similarly, petitioners say the lower court decisions in this case make risk enhancement unavailable (Pet. Br. at 7, 12);[10] in fact, the district court indicated (and the Seventh Circuit did not deny) that such compensation was available in appropriate cases,[11] and it described with great approval a case in which a risk

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[9] Sup. Ct. Rule 17.1.

[10] Petitioners say "The district court . . . refused to apply a multiplier as a matter of law." Pet. Br. at 12. They also say "The court below [the Seventh Circuit] . . . appear[s] to hold that there is never a right to receive a multiplier as compensation for having undertaken risk." *Id.* at 7. As the next footnote shows, those claims are just plain wrong.

[11] The district court wrote that "*Of course,* the size of the settlement is not the only feature of this case [bearing on enhancement]. *Consistent with this notion* lead counsel argue that the risk they took [justifies a multiplier]" 618 F. Supp. at 1061; Pet. App. at C28 (emphasis added). After a lengthy discussion, the court held that "lead counsel have not met the required burden" on this point, 618 F. Supp. at 1062; Pet. App. at C31. The Seventh Circuit affirmed this disposition under Fed. R. Civ. Pro. 52(a); it did not question the district court's legal position on risk enhancement 810 F.2d at 606-609; Pet. App. at A8-14.

bonus was given. 618 F. Supp. at 1062-64; Pet. App. C31-35. In these and other ways, the petition misstates what the lower courts held, in an effort to convert petitioners' failure to meet proof burdens into supposed legal error.

Petitioners' one-sided account of the record has the same apparent purpose. By mentioning only evidence favorable to their position, petitioners create the impression that the lower courts could have only acted on erroneous views of the law. In fact, BN made a substantial presentation on each of the factual issues in the case. Thus, it is *not* true, as petitioners claim, that the "uncontradicted" evidence showed they had less than an even chance of prevailing (Pet. Br. at 3, 12-13); in fact, BN presented substantial evidence and argument that this case was not markedly risky.[12] It is likewise false for petitioners to suggest that some of their attempts to prove the relief here "truly exceptional" were "uncontraverted". Pet. Br. at 14-16, n.6. Once again, BN made an extensive presentation on why the relief achieved, while fair and adequate, was not "exceptional" and was mostly a product of the class' size.[13]

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[12] A summary of BN's evidence on that score covers eleven pages of the company's brief before the Seventh Circuit. See BN's Seventh Circuit Brief at 26-37 (February 20, 1986).

[13] See BN's Seventh Circuit Brief at 41-44. Petitioners' account of the evidence is flawed in other ways. For example, petitioners repeat the canard that a 1981 shift in Title VII proof from "snapshot" to "flow" statistics created great risk (Pet. Br. at 9), even though BN has repeatedly pointed out that this Court endorsed both kinds of proof in 1977, well before *McBride* was filed. See *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13, 309-13 (1977). In addition, it is wrong to say that Professor Frank Easterbrook's affidavit was "completely ignored" by both lower courts or to imply that it was unrebutted (Pet. Br. at 8, 9-10). Similarly, it is at least misleading for petitioners to retail their experts' "$57.5 million" appraisal of part of the settlement (Pet. Br. at 4) without mentioning that the district court found that esti-

This Court, of course, need not resolve such factual battles. The lower courts have done that three times. But to evaluate whether there are legal questions warranting review, it is essential to know that BN presented persuasive evidence on risk and relief, and that the lower courts carefully considered both sides' evidence. Petitioners lost their enhancement arguments on the facts, not because either lower court held such enhancement unavailable as a matter of law.

II. DENIAL OF THE WRIT IS CONSISTENT WITH THIS COURT'S RECENT *DELAWARE VALLEY* DECISION AND WITH ITS PRIOR FEES OPINIONS

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (U.S., June 26, 1987), ("*Delaware Valley II*"), this Court extensively analyzed the logical and legal implications of attorneys fees risk enhancement. Though the members of the Court took a variety of paths in that case, the destination reached by five Justices—that is, reversal of a risk multiplier award—shows that the petition here should be denied.

In *Delaware Valley II*, the respondent attorneys sought risk-based fee enhancement by offering proof that their contingent representation had succeeded in the fact of "new and novel issues,"[14] defense intransigence, and other "unusual difficulties."[15] This proof convinced the district judge that a multiplier was justified, but it was held insufficient by a majority of this Court. Five Justices concluded that, because the proof in *Delaware Val-*

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mate to be of "very little" value and implied that it verged on "attorney fees puffery." 618 F. Supp. at 1059-60; Pet. App. C26-27. There are many other such examples in the petition.

[14] *Delaware Valley II*, concurrence at 4, quoting the district court's opinion at 581 F. Supp. 1412, 1431 (E.D. Pa. 1984).

[15] *Delaware Valley II*, concurrence at 4; see also *id.*, plurality at 2-3.

ley II concerned matters unrelated to risk or adequately compensated in a lodestar award,[16] the enhancement ordered should be reversed.

In this case, petitioners have offered much the same evidence. They have claimed that BN "spare[d] no expense" in its defense and "sought to wear down plaintiffs and their counsel." Pet. Br. at 10, 15. They have argued that the case presented new and everchanging issues. *Id.* at 8-9. And—like the respondents in *Delaware Valley II*—they have made much of the fact that they took what they say was a very risky case on a contingent basis.

In *Delaware Valley II*, such arguments, even though persuasive to the district court, did not justify risk enhancement—or even reconsideration of such enhancement—for five members of this Court. In *this* case, petitioners' proof, when rebutted by BN, did *not* persuade the district court. Having failed in their factual proof, petitioners should not be more favorably treated than were respondents in *Delaware Valley II*, who at least succeeded at the trial level on the selfsame issues.

There is another way in which denial of the petition is consistent with *Delaware Valley II*. Five Justices in that case concluded that risk enhancement might be called for "in selected cases." Dissent at 22. Each of the two opinions joined by those five Justices identifies factors that might bear on whether risk enhancement should be provided. Petitioners and BN offered evidence on virtually all of those points, and still the district court found enhancement unnecessary.

The concurrence in *Delaware Valley II*, for example, agrees with the plurality that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding coun-

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[16] *Id.* plurality at 18; concurrence at 4.

sel.'" Concurrence at 4. In this case, however, the evidence showed no lack of lawyers willing to sue BN: Mr. McBride and his colleagues were referred by the EEOC to the Barnhill firm, which took their case (Tr. 301), and, as the district court specifically found,

> So many lawyers . . . were willing to represent complaining Negro employees of the railroad and so many suits were filed in different United States district courts against it, that Burlington had to seek relief from the Multi-District Litigation Panel. 618 F. Supp. at 1062; Pet. App. at C30.

The district court also received testimony from petitioners' experts[17] on what the *Delaware II* concurrence called the way "the relevant market [would] compensate [] for contingency."[18] But, after also considering BN's cross-examination, argument, and rebuttal, the district court was unpersuaded by those experts' views, and concluded that rates mostly ranging between $160 and $180 per hour for every hour claimed constituted reasonable compensation, even taking risk into account.[19] See 810 F.2d at 608; Pet. App. at A12-13.

Finally, the district court found that a multiplier like that sought by lead counsel was not, as the *Delaware Valley II* concurrence put it, "necessary to bring the fee

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[17] Tr. 62-65, 62-83, 105-22 (Testimony of Thomas Sullivan); Lead Counsel's Proposed Findings of Fact and Conclusions of Law at 36-39 (February 27, 1985).

[18] Concurrence at 3. See also dissent at 21.

[19] Notably, no opinion in *Delaware Valley II* prescribes lodestar enhancement as the *exclusive* means of compensating risk. The Justices who endorse the possibility of such compensation require only that a district judge consider risk and fashion an award "reasonable" in light of it. As the dissent in *Delaware Valley II* seems to recognize, basic hourly rates—especially high ones—can do that in whole or part. See dissent at 6, n.4. In that sense, what the lower courts did here is entirely consistent with *Delaware Valley II*.

within the range that would attract competent counsel". Concurrence at 3. In the words of the Seventh Circuit, the district court was not persuaded by

> the lead counsel's evidence claiming that the risks of Title VII litigation in general were such that multipliers were necessary to attract competent counsel. 810 F.2d at 605; Pet. App. at A6.[20]

This Court, of course, is not a place to reargue the evidence. Instead, the critical point is that petitioners offered evidence on the risk related points held insufficient, *and* those viewed as significant, by a majority of the Court in *Delaware Valley II*.[21] BN offered extensive rebutting evidence and argument. The district court considered it all, concluded that risk enhancement was not called for, and found that a $2.18 million lodestar fees award was "reasonable" compensation. 618 F. Supp. at 1068; Pet. App. at C44. The court of appeals affirmed that finding because it was not an abuse of discretion. 810 F.2d at 608; Pet. App. at A12-13.

The fact of the matter is that petitioners got a full opportunity to prove their contentions on risk, but were unsuccessful. They were not encumbered by a narrow

---

[20] The district court's specific finding on this point is at 618 F. Supp. at 1061; Pet. App. at C30 ("[I]t is just not true that unless lead counsel are given the 2.5 multiplier they request . . . competent lawyers in Title VII cases will be discouraged from undertaking representation of persons with such civil rights grievances.")

[21] The dissent in *Delaware Valley II* also suggests that some factors may reduce the need for contingency enhancement. One of those is the presence of other firms to which risk can be spread. Dissent at 17-18. Here, there were two principal law firms and a number of tagalong lawyers representing plaintiffs; more important, the EEOC provided staff and financial assistance, and its very presence reduced certain legal risks. See BN's Seventh Circuit Brief at 27 (February 20, 1986).

or erroneous view of the law.[22] There is nothing in this basically factual dispute warranting review by this Court.[23]

III. THE SEVENTH CIRCUIT'S REFUSAL TO DISTURB A FINDING THAT THE RELIEF HERE WAS NOT "EXCEPTIONAL" DOES NOT JUSTIFY REVIEW BY THIS COURT

Petitioners also briefly contend that there is an important legal issue lurking in the Seventh Circuit's affirmance of the district court's failure to be persuaded by their arguments on the quantity of relief. Pet. Br. at 14-15.

In fact, the court of appeals' action on this point did not establish new or aberrant law. The Seventh Circuit was guided solely by the standard set out in *Pennsylvania v. Delaware Citizens' Council for Clean Air*, 106 S.Ct. 3088 (1986) and *Blum v. Stenson*, 465 U.S. 886 (1984): even excellent success does not justify enhancement, but, in "rare" cases, the attainment of "exceptional" success may do so. See 810 F.2d at 606-08; Pet. App. at A9-11. Under that legal standard alone, the court of appeals affirmed. It added not a word to the law on result based fees enhancement.

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[22] The Seventh Circuit's opinion relies on the Court's explicit holding in *Blum v. Stenson*, 465 U.S. 886 (1984) and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3055 (1986) that lodestar fees are presumptively the reasonable award contemplated by fees statutes, 810 F.2d at 606-08, 611; Pet. App. at A9-11, B2. That holding is not overruled by *Delaware Valley II*, and seems to represent the views of a majority of the Court (plurality at 16; concurrence at 3-4). The continuing vitality of the *Blum/Delaware Valley I* presumption underscores the fact that petitioners' problems are caused by failures of proof, not errors of law.

[23] The Petition asks alternatively that this case be remanded on the question of risk enhancement (Pet. Br. at 7). That would be inadvisable because, as shown, it would be at odds with the disposition of *Delaware Valley II*. In addition, as also shown, the issues discussed in that case have already been the subject of proof, argument, and consideration below.

Petitioners criticize the district court for comparing the Consent Decree to truly exceptional outcomes in other cases. They suggest that the Seventh Circuit's affirmance of that approach created an unattainable standard for exceptional success. Pet. Br. at 14-15.

Petitioners are wrong. To begin with, it does not seem improper to determine whether a given result is exceptional by judging whether it resembles outcomes that really were. More important, the comparison petitioners attack was not the district court's only basis for its finding on relief. The court also considered the kind of remedies achieved, the average payout to class members, and the probable impact of the Decree. 618 F. Supp. at 1056-60, 1062-64. Pet. App. C20-28, C31-35. It could scarcely have done more.

There are few questions more factual than whether the result in a given case is "exceptional." The trial judge, especially one who has managed a case for years and knows it intimately, is uniquely well qualified to make that determination. Here, both lower courts thought the outcome was commendable. They did not think, as do petitioners, that it was "exceptional." The difference between those two characterizations, however, does not warrant review by this Court.

CONCLUSION

The petition for certiorari should be denied.

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(3)

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No. 86-1880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SPRENGER, OLSON & SHUTES, P.A.
and DAVIS, MINER, BARNHILL & GALLAND,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This supplement presents petitioners' view of the impact of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 55 U.S.L.W. 5113 (June 26, 1987) on the Petition for Writ of Certiorari.

This case is the logical next step for review after *Delaware Valley*. This case is representative of those in which an enhancement for risk must be awarded to attract competent counsel. The District Court and Court of Appeals reached their results for different reasons. But since both analyses are inconsistent with the standards set down in *Delaware Valley*, this case must be reversed in any event. Moreover, this is a particularly good case for consideration and explication of how a risk enhancement should be applied in a context where it ought to be applied and where petitioners introduced the necessary evidence with regard to relevant market considerations in the trial court.

This case is the kind of case Congress hoped would be brought. It was the largest pretrial race discrimination settlement in history and it secured unprecedented relief to a large class of black employees in an industry that historically has been tainted by segregated job opportunities.

Yet, this case would never have been brought without the incentive of a possible award of an enhanced fee for several reasons. First, it was too risky; the evidence is uncontradicted that the plaintiffs had less than a 50/50 chance of prevailing. Second, the case was too expensive. Lead counsel had to advance roughly one million dollars in costs (virtually none of which were objected to by defendants during the fee proceedings) to prosecute this case. Third, it was too time consuming. Two small firms spent over 17,000 hours of lawyer and paralegal time prosecuting this action. Fourth, because this case was brought in large part to secure classwide equitable relief, there

was no possibility of a contingency agreement being developed that would be attractive to counsel.

If an enhancement for risk is not required in such a case, no case like this will ever be brought. Petitioners actually proved just this in the fee proceeding. In the trial court petitioners submitted overwhelming and uncontradicted proof that competent counsel could not be induced to prosecute cases of this significance without an enhancement for risk.

Professor, now Judge, Easterbrook, after reviewing the risks and costs involved in this case, testified that a substantial enhancement was necessary here because:

> (1) in order to induce competent counsel to take difficult litigation of this sort, it is necessary to offer the prospect of fees that will make them at least as well off as if they worked at their market rates for clients who paid when billed . . .

And he concluded that this principle had special application in cases of this type:

> Often lawyers who work in risky cases can hedge their bets. The members of the plaintiffs' bars in antitrust and securities have found it possible to "syndicate" their cases. Each lawyer works on many cases at once; each case is staffed by teams of lawyers. This spreads risk. But the lawyers who work in the civil rights bars have not found the syndication of risk possible. For many reasons—and we are not sure we fully appreciate them, but they must include difficulties of conflicts of interest—the civil rights bar is organized into very small firms. The firms of lead counsel in this case are tiny compared with the 200-lawyer firms representing defendant. Worse for the risk problem, each lead counsel has sunk the bulk of his professional life for several years into this case. His fortune stands or falls on this application for fees. That is not a comfortable position.

> Nonetheless it seems to be a necessary one in civil rights litigation. When risk is not spread across many cases—when, as here, a litigator must put all his eggs in one basket, the need to multiply the gains in order to offset the losses is at its greatest. Thus we have no doubt about the propriety of a substantial multiplier in this case. (App. D-1-2, 16)[1]

Professor Easterbrook's testimony was supported by testimony placed before the District Court of witnesses who actively labor in the civil rights arena. Julius Chambers, Director-Counsel of the NAACP Legal Defense and Education Fund, testified:

> [I]t is my experience that cases such as this will not continue to be brought unless a substantial fee enhancement in the form of a multiplier is given in cases where the plaintiff is successful.
>
> . . .
>
> [I]t is already difficult to staff Title VII cases with experienced and competent lawyers in private practice. Indeed, I am aware of the existence of only a handful of firms nationwide who spend more than 50% of their time prosecuting contingent Title VII litigation.
>
> . . .
>
> [I]t is imperative if Title VII is to be enforced as Congress intended that substantial fee enhancements for risk and results be made in cases such as this to attract competent legal counsel. (Chambers Aff. pp. 2,4)

John E. Jacob, Chief Executive Officer of The National Urban League, stated:

> It is The League's experience that as a general matter there are not an adequate number of qualified and experienced plaintiff's civil rights lawyers in this country to meet the legitimate demand for these services.

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[1] All citations to Appendix are to the Appendix to the Petition for Certiorari.

> One reason for the paucity of lawyers handling civil rights matters is that these cases must be prosecuted on a contingent fee basis as opposed to an hourly fee basis because most of the plaintiffs do not have the money to fund a major lawsuit.
>
> A second discouraging factor is that proving such cases is difficult because one must prove the "state of mind" of the defendant.
>
> Further, it is the general perception of the legal community with whom The League works that courts are reluctant to award substantial fees in Title VII cases. Thus, these attorneys believe these cases are too risky and, even if successful, likely to be unrewarding.
>
> The League's experience is that this vacuum is not being filled by the EEOC to any substantial extent.
>
> To adequately increase the availability of knowledgeable practitioners in this area, it is necessary to ensure that attorneys who take complicated Title VII cases are compensated not simply for the hours they put in, but also for the risks they have had to bear during the lawsuit. (Jacob Aff. pp. 4-5)

Bruce Elfvin, then Assistant General Counsel of the Equal Employment Opportunity Commission, attested to the same facts:

> My experience is that less than vigorous prosecution of Title VII cases by private counsel is commonplace. I believe that this is true for two factors, among others. First, the fee awards have generally not been sufficient to compensate private counsel for the risk of these cases. Hence, many knowledgeable counsel have left the field. Second, because so few attorneys have been able to make a living on the plaintiff's side of Title VII cases, few really knowledgeable and experienced lawyers are attracted to or remain in the field.
>
> The reluctance of knowledgeable and experienced lawyers to routinely represent plaintiffs in Title VII

> cases causes enforcement problems for the EEOC. The EEOC has been consistently understaffed in relation to the complexity of tasks and workload it has been charged by Congress to accomplish. Additionally, because of its federal salary structure, it does not retain as many knowledgeable and experienced litigators as it would wish. Thus, the EEOC needs the enforcement assistance of knowledgeable and experienced members of the private bar.
>
> It is my opinion that compensation adequate to attract knowledgeable and experienced attorneys into the employment discrimination field is necessary. Because of the risky nature of Title VII cases, such compensation should include enhanced fee awards to compensate for the risk of losing a particular lawsuit. Otherwise knowledgeable and experienced litigators will look elsewhere for the economic rewards in their profession. (Elfvin Aff. pp. 5-6)

The need for an enhancement for risk if cases such as the instant case are to be brought was further confirmed by testimony provided to the District Court of distinguished attorneys practicing in large and small firms in the relevant market. Thomas Sullivan, former United States Attorney for the Northern District of Illinois, who is now a senior partner in the firm of Jenner & Block, a large Chicago law firm with a substantial reputation for doing *pro bono* work, stated:

> In my opinion and experience, large law firms will not normally make the financial sacrifice to prosecute this kind of racial discrimination suit. Accordingly, if attorneys the caliber of lead counsel are to be attracted to this kind of law enforcement litigation, the compensation they receive should adequately reflect the risk undertaken. Therefore, a substantial multiplier or premium should be added to the hourly rates customarily charged by plaintiff's counsel. (Sullivan Aff. p. 11)

Barrington D. Parker, Jr., of the small New York firm of Parker Ausprite Neesemant & Delhanty, described that although Mr. Parker was on the board of the NAACP Legal Defense and Education Fund, his firm had made a policy decision not to become involved in cases such as this one because they are too risky.[2]

Indeed, the testimony of the witnesses was unanimous that risk multipliers were essential to attract competent counsel into the field of large, multi-party civil rights cases such as this. *Burlington Northern offered no contrary testimony.*

Thus, this case surely was one which "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " 55 U.S.L.W. at 5120 (concurring opinion of Justice O'Connor)

Although abundant evidence on the subject was offered, neither the District Court nor the Court of Appeals analyzed this case to determine whether a risk multiplier was necessary to enable plaintiffs to find competent counsel for this case. Indeed, the trial court refused even to entertain evidence that an enhancement was necessary to attract competent counsel to this case and others like it, announcing that any such notion was demeaning to the bar:

> You mean to tell me lawyers—are you telling me the legal profession has gotten to the point that unless there is a multiplier in fee rates, competent conscientious lawyers will not undertake cases? . . .

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[2] Even Burlington Northern's expert, Professor Steven Shavell, admitted in his deposition that enhanced compensation must be paid for undertaking risk if enforcement of the civil rights laws is not to be left in large part to charity. (Lead Counsel's Ex. 4, Shavell Dep. Tr. 54-55, 113-15, 136)

> I won't sit here and hear the profession demeaned in this way![3] (Transcript of Proceedings, Tr. 322-23)

Based upon this feeling, and in complete disregard of the uncontroverted evidence in the record on this issue, the trial court expressed its personal opinion as a judicial finding:

> It is unpleasant, even painful, for it to disagree with [plaintiffs'] witnesses but the court must. It must say it is just not true that unless lead counsel are given the 2.5 multiplier they request in this case, competent lawyers in Title VII cases will be discouraged from undertaking representation of persons with such civil rights grievances. Those who think so either do not know or remember the history of the struggle for equality under law in this country or they have no faith in the stamina and potential of American lawyers to come forward and vindicate, in the courts, the claims of those whose civil rights have been violated.[4] (App. C-30)

The Seventh Circuit chose not to endorse the District Court's feelings that petitioners' request for an enhancement demeaned the bar. Instead it first noted that it was uncertain about where to go with respect to a multiplier:

> Until [the Supreme Court] issues an opinion on that question, therefore, we are left with some uncertainty regarding the wisdom of risk multipliers. (App. A-11)

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[3] Paradoxically, the District Court stated during the hearing that it would assume that it was difficult to find competent counsel to represent plaintiffs in the field of employment discrimination. (Transcript of Proceedings, Tr. 321-22) The District Court, however, gave no weight to this assumption. As *Delaware Valley* makes clear, the difficulty of finding counsel for this type of case was one of the central questions before the trial court in making its determination of whether a risk enhancement was needed, and petitioners fully met their burden on this question.

[4] In support of this conclusion the trial court cited no evidence—Burlington had provided none—but instead ostensibly relied upon

(Footnote continued on following page)

Nevertheless, the Court of Appeals decided an enhancement should not be granted in this case on the basis of the following analysis:

> Even in the absence of questions concerning the propriety of risk multipliers, we would consider dispositive the district court's finding that this case involved factual complexities and difficulties of trial preparation, but not the kind of significant risk engendered by having to rely on new legal theories of recovery or new remedies. (App. A-12)

Petitioners sought a rehearing, pointing out that risk multipliers had generally not been limited to only those situations where a plaintiff had to rely on new legal theories for recovery or new remedies.

In response, the panel issued an opinion that failed to clarify whether it had given any consideration to the issue whether a risk multiplier was appropriate:

> In this case, the district court did not find that the plaintiffs' success was exceptional within the meaning

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[4] *continued*
the fact that other counsel had filed individual Title VII cases at various times in different sections of the country, which Burlington had moved to have consolidated by the multi-district panel. In making this observation, however, the trial court simply ignored the fact that none of these consolidated cases were class actions and, with isolated exceptions here and there, none of the plaintiffs' counsel played any role in the class action proceedings, but simply rode lead counsel's coattails. Indeed the dearth of lawyers jumping on lead counsel's bandwagon shows how different the civil rights "market" is from the securities or antitrust "market" where, after indictments, huge numbers of plaintiffs' firms will volunteer for positions of leadership in the subsequent class action. Moreover, the District Court clearly could not properly rely upon the fact that some attorneys were willing to file related individual Title VII cases at the time this class action was initiated. Given the law regarding risk enhancement at that time, attorneys naturally acted in the belief that they would be compensated for undertaking risk if they prevailed.

> of *Blum*, and in the absence of evidence to demonstrate that this finding was an abuse of discretion, we were constrained to follow *Blum* and affirm the district court's judgment. In so deciding, we did not address whether the lodestar amount should ever be adjusted upward to compensate for the risk of loss. Neither did we address whether, assuming this type of adjustment is legitimate, the use of a multiplier is an appropriate means to achieve this purpose. These questions remain open in our circuit. *See Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986). We look to the decision in *Delaware Valley* to shed more light on this area. (App. B-3)

This passage suggests that the Seventh Circuit made no decision on the issues raised by petitioners' request for a risk multiplier and their supporting evidence that was framed precisely in the terms of the standards announced in *Delaware Valley*. It is clear that the only standard applied by the District Court to deny a risk multiplier was its conclusion that plaintiffs had not utilized new or novel legal theories and it appears that the Seventh Circuit only decided that petitioners' exceptional success did not warrant a multiplier.

The plurality opinion in *Delaware Valley*, and Justice O'Connor's concurrence, now make clear that such an analysis was wrong with regard to the question whether petitioners were entitled to a risk multiplier. Moreover, the dissenting opinion would only utilize such an analysis to determine if an additional multiplier was warranted. The lower courts, thus, never addressed the proper issues.

CONCLUSION

Certiorari should be granted. This is a particularly good case for review. It presents the risk enhancement issue in its most pristine form. Here plaintiffs' counsel undertook a seven year struggle at great personal risk, and persisted in prosecuting the class action to a successful conclusion despite increasing risk. Since there was no means of mitigating the risk by, for example, signing a contingency agreement with the plaintiffs, their fees were wholly in the hands of the court. This is especially true because such a large part of the relief that petitioners achieved in this case flowed from the provisions of the Consent Decree that required reinstatement, hiring, promotion and training of black employees. At the conclusion of this proceeding, the District Court awarded plaintiffs' counsel less per hour than they would have made had they taken a risk-free case and been paid on a regular, monthly basis. No one but a saint will take a case like this in the future if that is the best they can expect and, however one reads the legislative history, it is clear that Congress wanted cases like this one brought.

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Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SPRENGER, OLSON & SHUTES, P.A.
and DAVIS, MINER, BARNHILL & GALLAND,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

With the exception of one statement by Burlington Northern ("BN"), all of the matters discussed in BN's Brief in Opposition to the Petition for Certiorari have been fully treated in the Supplement to Petition for Writ of Certiorari. The one matter not addressed in the Supplement is BN's misleading implication that it introduced evidence in the district court on the issue of whether a fee enhancement to compensate for risk was necessary to attract competent counsel to take this case. (BN Opp. 11)

It is false for BN to suggest that it introduced *any* evidence to refute petitioners' showing that plaintiffs could not obtain competent counsel "in the market" without the

prospect of an enhanced fee. Not only did BN fail to introduce any evidence of its own, BN did not challenge the evidence presented by petitioners. There was simply no conflicting evidence on this point for the lower courts to assess, and petitioners are not urging this Court to review any factual finding that was supported by any evidence in the record.[1]

The uncontroverted evidence offered by petitioners included the testimony of leading civil rights lawyers and economic experts who stated that without the availability of sufficient risk enhancement of fees, *this case would not have been brought.* The affidavits of Professor (now Judge) Frank Easterbrook, Julius Chambers, John E. Jacob, Bruce Elfvin, and Barrington D. Parker, Jr., which were introduced into evidence by petitioners at the fee hearing, stood uncontradicted by BN.[2] Thomas Sullivan and Professor Herbert Hill testified in detail at the fees hearing from their own experience in civil rights litigation to the necessity of fee enhancements to secure counsel for a case like this one. (Transcript of Proceedings 76-83, 94-97, 106-07) Neither witness was even cross-examined by BN on this subject.

BN presented nothing to rebut petitioners' economic evidence on the need for a fee enhancement. Indeed, BN chose not to use its own economic expert, Professor Steven

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[1] BN represents (BN Opp. 8 n. 12) that it offered substantial rebutting evidence below which is summarized at pp. 26-37 of its appellate brief. The pages cited contain only conclusory references to the strong evidence of discrimination uncovered by petitioners, EEOC's presence in the case, and the supposedly significant chance of settlement in a case fought to the day of trial.

[2] BN conducted extensive discovery with respect to petitioners' fee request, including the depositions of Professor Easterbrook, Thomas Sullivan, Bruce Elfvin, and Professor Hill.

Shavell, because he agreed with Professor Easterbrook that enhanced fees are essential if the civil rights laws are to be enforced through private litigation. Ironically, petitioners—over BN's objection that such economic evidence was irrelevant (Transcript of Proceedings 353-355)—introduced Professor Shavell's deposition testimony at the fee hearing to corroborate the Easterbrook testimony.

The only circumstance cited by the district court for its feeling that risk enhancement of fees was not necessary to attract competent counsel was the fact that certain other attorneys had brought individual Title VII actions against BN around the time this case was brought.[3] This "finding" by the district court is the only thing in the record BN can now cite to uphold the decisions of the lower courts. (BN Opp. 11)

The fact, however, that other attorneys filed complaints against BN proves absolutely nothing, for three reasons. First, the other actions were brought for individual employees and involved none of the problems or risks associated with representation of the broad classes for which petitioners sought relief. Second, as BN itself brought out below, the evidence was uncontroverted that these tag-along counsel simply rode in petitioners' wake and contributed nothing—neither legal services nor costs—toward prosecution of the case.[4] Finally, at the time these cases

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[3] The district court also relied upon its belief, which was not supported by any evidence offered at the hearing, that the history of the struggle for equality demonstrates that attorneys will come forward to represent plaintiffs in civil rights cases without fee enhancement. BN's Opposition does not even attempt to support this ground for rejecting petitioners' showing.

[4] *Burlington Northern's Preliminary Response to the Fees and Expense Petition of: Jarve Garrett and Fishman Legal Services*, filed July 13, 1984, p. 20.

were brought against BN in 1978, the law strongly supported risk multipliers, very large multipliers were given in a number of cases, and attorneys reasonably believed they would be compensated for undertaking risk in contingent cases if they won.[5] Obviously, one cannot use the behavior of attorneys who expected to be compensated for risk to show that attorneys would have brought this case even if it was clear that no fee enhancement for risk would be available.

CONCLUSION

BN attempts to minimize the factors in this case that compel some fee enhancement under the standards set in *Pennsylvania v. Delaware Valley Citizens Council For Clean Air*, 55 U.S.L.W. 5113 (June 13, 1987). But BN can point to no evidence in the record contrary to petitioners' showing that plaintiffs would have faced insuperable difficulties in finding competent counsel in the relevant market

[5] Examples of cases giving high multipliers in the period in which these cases were filed are: *Vacchione v. Wohlgemuth*, 481 F.Supp. 776 (E.D. Pa. 1979) (multiplier of 2.0 in civil rights case); *Aronson v. Board of Trade*, 372 F.Supp. 1349 (N.D. Ill. 1974) (multiplier of 4.0). Courts continued to grant substantial multipliers in the 1980s. *See, e.g., In re Corrugated Container*, 1983-2 Trade Cases ¶ 69,628 (S.D. Tex. 1983) (multipliers of 3.5 and 4.0); *Rajender v. University of Minnesota*, 546 F.Supp. 158 (D. Minn. 1982) (multiplier of 3.0 in Title VII case); *Municipal Authority of Bloomsburg v. Pennsylvania*, 527 F.Supp. 982 (M.D. Pa. 1982) (multiplier of 4.5); *Pacific Plumbing Supply Co. v. Crane Co.*, 1982-1 Trade Cases ¶ 64,473 (W.D. Wash. 1982) (multiplier of 3.0); *In re Cenco Securities Litigation*, 519 F.Supp. 322, 327 (N.D. Ill. 1981) (multiplier of 4.0 awarded to lead counsel); *Keith v. Volpe*, 501 F.Supp. 403 (C.D. Cal. 1980) (multiplier of 3.0 in civil rights case).

without the expectation that a fee enhancement would be paid to compensate for risk. The unequivocal and uncontradicted testimony of the witnesses called by petitioners on this point was reinforced by the following critical facts that BN cannot dispute:

(i) Petitioners were completely dependent on winning the case to receive any fee and reimbursement of $1 million in expenses.

(ii) Petitioners could not in this class action make any arrangements with their clients that would compensate them for undertaking risk.

(iii) This was a very risky case.

(iv) Petitioners were granted no fee enhancement to compensate for risk. Instead they were paid only the hourly rates which are "paid to comparable attorneys in the relevant community" for non-contingent, risk-free legal work. *EEOC v. Burlington Northern, Inc.*, 618 F.Supp. 1046, 1055.

In light of this Court's decision in *Delaware Valley*, and the failure of the lower courts to analyze the issue of compensation under the proper standards, petitioners respectfully request that the Petition be granted and the decision of the Seventh Circuit be reversed.

Respectfully submitted,

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Dated: August 3, 1987

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